86-487

No. 86- ____

Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED and ROBERT M. KOLACZYNSKI,

Petitioners,

—v.—

ESTELLE JACOBSON and CYNTHIA CARSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The federal Arbitration Act mandates enforcement of valid agreements to arbitrate statutory claims, unless Congress has otherwise expressly exempted the claims from arbitration. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 105 S. Ct. 3346 (1985). Whether judicially implied rights of action under Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") are exempt from this arbitration mandate is an open question. *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985). The majority below held (1) that arbitration of Section 10(b) claims cannot be compelled and (2) that claims asserted under the federal Racketeer Influenced and Corrupt Organization Act ("RICO"), when predicated upon Section 10(b) claims, are also exempt from arbitration.

1. Did the court below err in holding that the mandate of the federal Arbitration Act does not apply to rights of action implied under Section 10(b)?

2. Did the court below err in holding that, although RICO claims generally are arbitrable, such claims may not be arbitrated when predicated upon alleged Section 10(b) violations?

PARTIES TO THE PROCEEDING

All of the Parties to the proceeding below are listed in the caption.*

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* Pursuant to Rule 28.1 of the Court, petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated states that it is a subsidiary of Merrill Lynch & Co., Inc., a publicly-held corporation whose shares are traded on, among others, the New York Stock Exchange. Subsidiaries of Merrill Lynch, Pierce, Fenner & Smith Incorporated that are not wholly-owned are: Merrill Lynch & Co., Canada, Ltd., Merrill Lynch Canada Incorporated/Incorporee, Merrill Lynch Life Agency Inc. (Ohio), Merrill Lynch Life Agency Inc. (Oklahoma), Merrill Lynch Life Agency Ltd. (Mississippi), Merrill Lynch-Nomura Management Company, Inc., and ML Life Agency Inc. Affiliates of Merrill Lynch, Pierce, Fenner & Smith Incorporated that are not wholly-owned by Merrill Lynch & Co., Inc. are ISU Companies, Inc., Merrill Lynch Bank & Trust Co., Merrill Lynch International Bank Limited, Mership Nominees Limited, Michigan Mart Properties Corp., Peaback Properties, Inc., Iran Financial Services Company S.S.K., Merrill Lynch Asset Management Limited, Merrill Lynch (Australia) Pty Limited, Merrill Lynch, Pierce, Fenner & Smith (Brokers & Dealers) Limited, Merrill Lynch, Pierce, Fenner & Smith Limited, Royal Securities Corporation (Canada) Limited, Paluel-Marmont Merrill Lynch S.A., Merrill Lynch Philippines, Inc., Merrill Lynch, Pierce Fenner & Smith Belge S.A., Merrill Lynch, Pierce, Fenner & Smith (Middle East) S.A.L., Merrill Lynch, Pierce Fenner & Smith S.A., Merrill Lynch S.A.L., Merrill Lynch Pierce, Fenner & Smith (Taiwan) Ltd., Property Protection Associates & Co., Merrill Lynch—Sun Hung Kai (Overseas Securities) Company Limited, Sun Hung Kai-Merrill Lynch Commodies Limited, Merrill Lynch Representacoes Ltda., Merrill Lynch Realty Commercial Services of Georgia, Inc., Hammill-Quinlan, Inc., Merrill Lynch Realty North Bay Inc., Merrill Lynch Realty/North Los Angeles, Inc., Merrill Lynch Realty/Boomhower, Inc., Merrill Lynch Realty/Burnet, Inc., Merrill Lynch Realty Carll Burr, Inc., Merrill Lynch Realty/Cousins, Inc., Merrill Lynch Realty Santa Barbara Inc., Merrill Lynch Realty/Jack Matthews, Inc., Merrill Lynch Realty/Katella, Inc., Merrill Lynch Realty/MCK, Inc., Merrill Lynch Realty/Richard Jowdy, Inc., Merrill Lynch Realty/Robedeaux, Inc., Merrill Lynch Realty/Tom Fannin Inc., ML/Rodgers & Cummings Insurance, Inc.

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No. 86- ____

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") and Robert M. Kolaczynski, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (1a)[1] is reported at 797 F.2d 1197 (3d Cir. 1986). The decision of the district court, dated December 3, 1984 (34a), is reported at 605 F. Supp. 510 (W.D. Pa. 1984); the decision of the district court upon motion for reconsideration, dated April 19, 1985 (28a), is unreported.

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1 Citations to material printed in the annexed Appendix appear as "___a".

JURISDICTION

The Court of Appeals issued its decision on August 11, 1986. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix to this petition sets forth the relevant statutory provisions. (53a.)

STATEMENT OF THE CASE

A. Factual and Procedural Background

Merrill Lynch is the largest securities broker-dealer in the United States, with business conducted throughout the country. Robert M. Kolaczynski was at the relevant times an account executive employed by Merrill Lynch. Respondents jointly opened a securities account with Merrill Lynch at its Pittsburgh, Pennsylvania office in 1981. Mr. Kolaczynski was assigned to this account. Each of the respondents signed a customer agreement with Merrill Lynch in which they expressly agreed to arbitrate all controversies as follows:

> It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration of the National Association of Securities Dealers, Inc. as the undersigned may elect.

(8a.) Respondents simultaneously opened an option account with Merrill Lynch and again agreed to arbitrate all controversies:

> Any controversy between us arising out of such option transactions or this agreement shall be settled by arbitra-

tion only before the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed.

In July 1984, respondents commenced this action pursuant to 28 U.S.C. § 1331(a) against Merrill Lynch and Mr. Kolaczynski, claiming supposed "churning" in their accounts. The complaint, as amended, includes violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b) ("1934 Act") and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), and state common law.

B. The Decisions Below

In August 1984, Merrill Lynch moved, *inter alia*, to compel respondents to arbitrate their claims as they had agreed, pursuant to the federal Arbitration Act, 9 U.S.C. § 2. The district court denied the motion. (34a.) Citing the Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), which had held that claims asserted under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77(j)(2) ("1933 Act"), were exempt from the mandate of the Arbitration Act, the district court concluded that respondents "cannot be held to arbitrate their federal securities claims." (36a.) The court so held even though respondents asserted their claims under the 1934 Act and not under the 1933 Act, the statute involved in *Wilko*. The district court also held respondents' RICO claim to be nonarbitrable. (36a.)

After this Court's decision in *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985), Merrill Lynch moved for reconsideration of its motion to compel arbitration. The district court again refused to compel arbitration of respondents' Section 10(b) claims but ordered the parties to proceed to arbitration with respect to respondents' RICO and state law claims. (28a.)

On appeal,[2] the Third Circuit consolidated for decision this case with four other appeals presenting similar issues.[3] (5a.) By a split decision, the court below affirmed the district court in part and reversed in part. Adhering to Third Circuit precedent,[4] the panel held that respondents' Section 10(b) claims were exempt from the mandate of the Arbitration Act. (12a.) As to the RICO issue, the court below concluded that such claims generally are arbitrable, because nothing in the RICO statute itself precluded arbitration of claims asserted under it. (12a.) Nevertheless, the majority barred arbitration of respondents' RICO claims, in that those claims are based upon alleged predicate violations of Section 10(b). The majority reasoned that, because Section 10(b) claims cannot be arbitrated, neither can RICO claims predicated upon such violations. (13a.)

Judge Adams filed an opinion concurring in part and dissenting in part. (15a.) Although he agreed the panel was bound by Third Circuit precedent to refuse arbitration of Section 10(b) claims, Judge Adams recognized that "[t]he issue of whether a 10b-5 claim may be subject to an arbitration agreement is a close and difficult one" and suggested that *en banc* consideration would be appropriate. (20a.) Judge Adams flatly disagreed with the majority's holding that RICO claims predi-

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2 Upon respondents' motion, the district court certified the issue of whether respondents' RICO claim is arbitrable to the Third Circuit. (32a.) Merrill Lynch and Mr. Kolaczynski exercised their right pursuant to 28 U.S.C. § 1292(a) to appeal the district court's order denying arbitration of respondents' Section 10(b) claims. (*See* 6a n.1)

3 The opinion below dealt with interlocutory appeals from five different cases pending in district courts in the Third Circuit that presented the issue of whether Section 10(b) claims are arbitrable. Two of those cases—this case and *Blumenthal* v. *Dean Witter Reynolds, Inc.*, D.C. Civ. No. 84-4799 (D.N.J. 1984)—also presented the issue of whether RICO claims are arbitrable.

4 *Ayers* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976). In that case, the Third Circuit, citing this Court's decision in *Wilko* v. *Swan*, 346 U.S. 472 (1953), had held that Section 10(b) claims were not arbitrable.

cated upon violations of Section 10(b) are not arbitrable; rather, in his view, "*all* RICO actions may be submitted to arbitration." (15a) (emphasis in original).

REASONS FOR GRANTING THE WRIT

The Court has admonished repeatedly that the federal Arbitration Act reflects "a national policy" mandating enforcement of valid arbitration agreements—a mandate that may not be avoided unless Congress has explicitly exempted a particular statutory claim from it. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3353-54 (1985).[5] The Court expressly has left unanswered whether the congressional bar it found to arbitration of claims asserted under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*,[6] applies equally to judicially implied rights of action asserted under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq. Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238, 1240 n.1 (1985).[7]

This case squarely raises the arbitrability of 1934 Act claims, as well as the arbitrability of RICO claims predicated upon alleged 1934 Act violations. Each of these issues, we respectfully submit, warrants determination by this Court.

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5 *See also Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).

6 *See Wilko* v. *Swan*, 346 U.S. 427 (1953) (barring arbitration of claims asserted under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77(1)(2)).

7 In *Byrd*, reiterating reservations expressed earlier in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court questioned those lower federal court decisions that had simply transferred the bar to arbitration of 1933 Act claims to allegations made under the 1934 Act. Justice White, concurring, observed that the issue of the arbitrability of 1934 Act claims "remains open and the contrary holdings of the lower courts must be viewed with some doubt." 105 S. Ct. at 1244 (White, J., concurring).

I.

THE ARBITRABILITY OF CLAIMS UNDER THE 1934 ACT AND RICO ARE ISSUES OF NATIONAL SIGNIFICANCE

The issues presented by this case are significant, not only for Merrill Lynch, but for the entire securities industry and for thousands of brokerage customers as well. The issues are equally significant to the administration of justice in the federal court system. Hundreds, if not thousands, of litigations are filed annually under the 1934 Act.[8] Cumulatively, these cases—including many meritless claims—impose an enormous cost upon an already overburdened court system as well as upon the securities industry.

This is so even though the claimants in most of these cases have contractually committed to arbitrate any disputes with their securities brokers. As a result of the decision below and decisions in other circuits that have ruled similarly,[9] however, the strong congressional policy favoring enforcement of such agreements has been nullified, and the public cost Congress sought to avoid through the Arbitration Act has become instead an increasing public burden.

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8 Statistics filed by the Administrative Office of the United States Courts indicate that over 3,064 private civil actions under federal "Securities, Commodities and Exchanges" statutes were filed in the district courts between April 1, 1985 and March 31, 1986. *See* Administrative Office of the United States Courts, *Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1986*, Table C-2 at 13.

9 *See Conover* v. *Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986), *pet. for cert. filed*, No. 86-321 (Aug. 29, 1986); *McMahon* v. *Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *pet. for cert. filed*, No. 86-44 (July 14, 1986); *Kidder, Peabody & Co.* v. *Intre Sport, Ltd.*, 795 F.2d 1004 (2d Cir. 1986), *pet. for cert. filed*, No. 86-40 (July 16, 1986); *Miller* v. *Drexel Burnham Lambert, Inc.*, 791 F.2d 850 (11th Cir. 1986); *King* v. *Drexel Burnham Lambert, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,872 (5th Cir. May 28, 1986).

The arbitrability of 1934 Act claims has been litigated in well over 100 cases decided since *Byrd*. (*See* 41a.) The arbitrability of RICO claims, appended to allegations of 1934 Act violations, also has arisen in at least 40 cases filed in the federal district courts. (*See* 49a.) As the Court has noted, the number of civil RICO actions has risen dramatically each year since the statute's passage. *Sedima, S.P.R.L.* v. *Imrex Co.*, 105 S. Ct. 3275, 3277-78 and n.1 (1985). That number inexorably will increase each year as more and more claimants seek as a matter of course to add the treble damage provision of RICO to claims against their securities brokers.

In sum, the issues here involved are widely litigated, of industry-wide significance and national application. Absent action by the Court now, the surge of litigation involving them is certain to continue, and inconsistent results of the sort that have already appeared are bound to proliferate—to the detriment of litigants and the courts alike.

II.

A DIRECT CONFLICT EXISTS BETWEEN THE CIRCUITS AS TO THE ARBITRABILITY OF 1934 ACT CLAIMS

Merrill Lynch, indeed the entire securities industry, faces diametrically opposed decisions in different circuits as to the arbitrability of 1934 Act claims. The circuits involved expressly have recognized the need for a resolution by the Court.

The court below, without extended discussion, relied upon pre-*Byrd* precedent in the Third Circuit and held that the bar to arbitration of claims under the 1933 Act applied equally to claims asserted under the 1934 Act. (12a.) In doing so, the panel acknowledged the direct conflict of its holding with that of the Eighth Circuit in another litigation against Merrill Lynch, *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986). (6a n.2.) Noting this split among

the circuits, Judge Adams in his concurrence below put the circumstances succinctly:

> [S]ome uncertainty necessarily will remain until the Supreme Court speaks authoritatively to this issue. Since commercial relations affecting thousands of investors and scores of brokerage houses will remain in the shadow of doubt until then, *an early definitive decision by the Supreme Court would be a helpful development.*

(20a) (emphasis supplied).

In *Phillips* the Eighth Circuit, after extensive analysis in light of the Court's decision in *Byrd*, had concluded that the bar to arbitration of claims under the 1933 Act did *not* apply to 1934 Act claims and directed arbitration.[10] In so doing, the *Phillips* court recognized its decision, in turn, would conflict with a recent opinion of the Second Circuit holding 1934 Act claims to be non-arbitrable. *McMahon* v. *Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *pet. for cert. filed*, No.

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10 Citing Justice White's concurring opinion in *Byrd*, the Eighth Circuit concluded:

> [A] plaintiff's cause of action under section 10(b) and Rule 10b-5 differs in important respects from his or her cause of action under section 12(2). . . . First, the section 10(b) and Rule 10b-5 private cause of action is implied rather than express. . . . Second, unlike in a section 12(2) action, the plaintiff in an action under section 10(b) and Rule 10b-5 bears the burden of proving scienter.
>
> * * *
>
> Based on these differences between the 1933 and 1934 Acts, and on the strong federal policy favoring enforcement of arbitration agreements, we conclude that *Wilko*'s holding and rationale does not extend to claims arising under section 10(b) of the 1934 Act and and Rule 10b-5. The non-waiver provision of the 1934 Act, section 29(a), simply does not override the Arbitration Act in the same manner as Section 14 of the 1933 Act when it is not buttressed by special rights and broad jurisdictional provisions similar to those found in the 1933 Act.

Phillips, 795 F.2d at 1397-98 (citations and footnote omitted).

86-44 (July 14, 1986). The Eighth Circuit faced this divergence directly:

> [F]ederal appellate courts, in the absence of precedent in their own circuit, tend to rely on precedent in other circuits. Ordinarily, then, in deciding a case of this kind, we would defer to the opinion of another circuit, such as rendered by the Second Circuit in *McMahon*, and avoid creating a conflict within the circuits. We believe, however, that the Supreme Court's opinions in *Scherk* and *Byrd* have invited a reexamination of the applicability of *Wilko* to claims arising under section 10(b) of the 1934 Act and Rule 10b-5. Because we are not bound by the precedents of other circuits, we are free to make a new assessment of this issue. We have made that assessment, and now create a conflict within the circuits. *We assume the Supreme Court will eventually decide this question.*

795 F.2d at 1399 (emphasis supplied).

In short, the conflict among the circuits is advertent and direct. Only a ruling by the Court will resolve it.

III.

THE COURT OF APPEALS DECISION CONCERNING THE ARBITRABILITY OF RICO CLAIMS RESOLVES IMPORTANT QUESTIONS OF FEDERAL LAW AND CONFLICTS WITH THE RATIONALE OF THE COURT'S RECENT HOLDINGS

In *Mitsubishi*, the Court taught that claims asserted under a given statute are arbitrable, absent a "congressional intention expressed in [that] statute . . . to identify any category of claims as to which agreements to arbitrate will be held unenforceable." 105 S. Ct. at 33. *Accord Byrd*, 105 S. Ct. at 1240-41; *Southland Corp.*, 104 S. Ct. at 8611 n.11; *Wilko*, 346 U.S. at 434-35. The Court further instructed that any such

preclusive intent, if it exists at all, must be found in the text and legislative history of the statute at issue. *Mitsubishi*, 105 S. Ct. at 3346.

The majority below followed the Court's admonition, but only up to a point. Analyzing the arbitrability of claims under RICO, the majority did review the text and legislative history of that statute and found "no" indication Congress had intended to bar arbitration of RICO claims. (12a.)[11] Even so, the majority went on to hold that RICO arbitration is prohibited any time Congress barred arbitration of claims asserted, not under RICO, but directly under the predicate statutes that RICO "cross-references." (12a.)[12] And, according to the majority, that congressional intent is to be determined by the text and legislative history of those *other* statutes, not of RICO itself.

Following its rationale, the majority held that arbitration of RICO claims predicated upon wire and/or mail fraud violations was permitted because, it found, Congress had not intended to bar arbitration under those predicate statutes. (13a-14a.) By contrast, having concluded that Congress had prohibited arbitration of 1934 Act claims, the majority held that arbitration of RICO claims predicated upon Section 10(b) violations was also precluded. The majority found "no evidence" in the legislative history of RICO that, by enacting it,

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11 In so holding, the majority acknowledged (6a n.2) its decision conflicted with that of the Second Circuit in *McMahon* v. *Shearson/American Express, Inc.*, 788 F.2d at 94, which had held that all RICO claims are exempt from arbitration.

12 RICO "takes aim at 'racketeering activity,' " which it defines as certain predicate acts, including acts "chargeable" under several generically described state criminal laws; acts "indictable" under specific federal criminal provisions, including mail and wire fraud; and offenses involving securities fraud, bankruptcy or drug related activities that are "punishable" under federal law. *Sedima, S.P.R.L.*, 105 S. Ct. at 3278; *see* 18 U.S.C. § 1961(1). RICO provides a private civil action to recover treble damages for injury "by reason of a violation of" its substantive provisions. 18 U.S.C. § 1964(c).

Congress intended to lift the bar prohibiting arbitration of disputes that arise directly under the 1934 Act. (13a.) For that reason, the majority held that "plaintiffs relying on section 10(b) violations" are entitled exclusively "to a judicial resolution of their RICO claims." (13a.)

The majority's holding warrants review by the Court for at least three reasons. First, the majority undermines RICO's statutory structure. The majority ignores that claims under RICO and those under its predicate statutes are not co-extensive; rather, each Act creates a separate claim with its own requisite elements. *See Sedima, S.P.R.L.*, 105 S. Ct. at 3278-80, 3285.[13] And, as Judge Adams stated in dissent below (25a), the arbitrability of claims under RICO and those under predicate statutes should be determined separately:

> I do not agree that an action under RICO must be treated for purposes of arbitrability as an action under the securities laws whenever it is based upon a predicate offense that violates Rule 10b-5, as the majority's statement . . . would suggest.
>
> A private right of action under RICO is a unique and separate claim to which the Arbitration Act logically applies. RICO is a manifestation of congressional concern with the special harm caused by those who engage in a pattern of wrongful offenses, and the private right of action under the RICO statute is distinct from one based on an underlying offense alone.

Second, the majority turns the Court's *Mitsubishi* teaching upside down. Rather than simply determining whether Congress, in enacting RICO, had intended to *prohibit* arbitration

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13 In order to establish a civil RICO claim a litigant must establish at least (1) the use of income (2) derived from a "pattern" (3) of "racketeering activity" (4) in the establishment or operation of an "enterprise" (5) engaged in or the activities of which affect "interstate or foreign commerce," U.S.C. § 1962(a), none of which elements may be required to establish the underlying predicate acts.

of claims under that statute, the majority looked to see if the RICO Congress had intended to *permit* such arbitration when arbitration would be prohibited for claims asserted directly under a predicate statute. (13a.) As Judge Adams emphasized in dissent, "*lack of evidence*" that Congress intended to allow arbitration of RICO claims cannot be substituted for the positive congressional indication required by *Mitsubishi* to avoid arbitration otherwise mandated. (24a (emphasis in original).)

Third, the majority elides the Court's holding in *Byrd*. In that case, the lower court had barred arbitration of state law claims closely "intertwined" with 1934 Act allegations in order to preserve exclusive federal court jurisdiction over the latter. *See Byrd*, 105 S. Ct. at 1240. The Court rejected that rationale. (*Id.* at 1243-44.) In this case, the majority found that, because securities law violations will remain "the heart of the dispute", respondents are entitled exclusively to "a judicial resolution" of their RICO claims. (13a.) In essence, the majority required just what *Byrd* had rejected.

As a result of the opinion below, not only is there a judicial divergence as to the arbitrability of RICO claims at all (see n. 11, *supra*), but confusion is also bound to develop even as to what portions of a single RICO claim fall within the mandate of the Arbitration Act. A resolution by the Court now as to whether RICO claims—some, all or none—may be arbitrated is plainly warranted.

CONCLUSION

Congress enacted the federal Arbitration Act to establish "a national policy." Yet, federal law as to the arbitrability of Section 10(b) disputes is now in hopeless conflict. That conflict, advertently created by the circuit courts, impacts the resolution of thousands of disputes throughout the country and creates uncertainty for the entire securities industry as well as the investing public. The conflict will continue until the

Court resolves it, which, we urge, the Court should do now. Federal law as to the arbitrability of RICO controversies also is in disarray. Existing circuit court decisions on this issue themselves conflict and, unless the Court acts now, will inevitably lead to still further confusion as district courts increasingly confront the issue. The Court should issue a Writ of Certiorari to review the decision below.

Dated: September 25, 1986
New York, New York

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 85-3282, 85-3311 and 85-3343

ESTELLE JACOBSON AND CYNTHIA CARSON

Appellants in Nos. 85-3311 and 85-3343

—v.—

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and ROBERT M. KOLACZYNSKI,

Appellants in No. 85-3282

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA-PITTSBURGH D.C. Civ. No. 84-1844

Argued April 17, 1986

Before:

ADAMS, GIBBONS, and MANSMANN, *Circuit Judges*

Nos. 85-5517 and 85-5542

MARILYN E. BURRIS

—v.—

PAINE, WEBBER, JACKSON and CURTIS, INC. SMITH BARNEY, HARRIS UPHAM & CO., INC., and DONALD J. PORTER
Smith Barney, Harris Upham & Co., Inc.,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY-NEWARK D.C. Civ. No. 83-3087

Submitted Under Third Circuit
Rule 12(6) April 14, 1986

No. 85-5439

ELLIS GANT

—v.—

KIDDER, PEABODY & CO., INC. and FRANK E. GATTA, JR.,
Jointly and Severally Kidder, Peabody & Co., Inc.,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY-NEWARK D.C. Civ. No. 84-5025

Submitted Under Third Circuit
Rule 12(6) April 14, 1986

No. 85-5552

HERBERT BLUMENTHAL

—v.—

DEAN WITTER REYNOLDS INC. and DANIEL J. TUROV
Dean Witter Reynolds Inc.,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY-NEWARK D.C. Civ. No. 84-4799

Submitted Under Third Circuit
Rule 12(6) April 14, 1986

No. 85-1541

MICHAEL ERLBAUM

—v.—

PRUDENTIAL-BACHE SECURITIES, INC. and
SAMUEL ALAN LIEBMAN

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA D.C. Civ. No. 84-5541

Submitted Under Third Circuit Rule 12(6) April 14, 1986
(OPINION FILED: AUGUST 11, 1986)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

This opinion deals with five interlocutory appeals presenting similar legal issues. All five appeals present the issue whether subsequent decisions of the United States Supreme Court have overruled this court's holding in *Ayers* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976), that claims against brokerage firms for violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)(1982), are not arbitrable. Two of the five appeals present the additional issue whether claims arising under sections 1962(a) and 1962(c) of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(a), (c) (1982), are arbitrable. Both these appeals present the issue whether a RICO claim is arbitrable when the predicate offenses on which it is based are section 10(b) violations. One of the appeals also presents the issue whether RICO claims are arbitrable when the predicate offenses are mail and wire fraud.

All the appeals are properly before us.[1] We affirm the orders denying the brokerage firms' motion to compel arbitration of the section 10(b) claims. We reverse the portion of the order in *Jacobson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 85-3282, 85-3311, and 85-3343, compelling arbitration of the RICO claim that was based on violations of section 10(b). We also reverse the portion of the order in *Blumenthal* v. *Dean Witter Reynolds, Inc.*, No. 85-5552, denying the motion to compel arbitration of RICO claims that are based on predicate acts of mail and wire fraud but affirm the portion of the order denying arbitration of a RICO claim based on section 10(b) violations.[2]

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1 Orders granting or denying motions to compel arbitration in actions seeking damages at law are appealable of right under 28 U.S.C. § 1292(a) (1982). *See, e.g.*, Cost Brothers, Inc. v. Travelers Indemnity Co., 760 F.2d 58, 59 n.1 (3d Cir. 1985); Rhone Mediterranee Compagnia v. Lauro, 712 F.2d 50, 51-52 (3d Cir. 1983); McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032, 1034-35 (3d Cir. 1974). All notices of appeal were timely. While two of the district courts certified the § 10(b) arbitration question under 28 U.S.C. § 1292(b) (1982), such certifications were not necessary.

2 Our holding that RICO claims based on nonarbitrable predicate offenses are not arbitrable conflicts with the holding of the Court of Appeals for the Second Circuit in McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986). In addition our holding that § 10(b) claims are not arbitrable is consistent with the Court of Appeals for the Ninth Circuit decision in Conover v. Dean Witter Reynolds, No. 85-6082 (9th Cir. July 17, 1986) but conflicts with the holding of the Court of Appeals for the Eighth Circuit in Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 85-5156 (8th Cir. July 9, 1986). According to the parties, the issues presented by these appeals are pending in the following courts of appeals:

First Circuit

Mowbray v. *Moseley, Hallgarten, Estabrook & Weeden, Inc.*, No. 83-2851-C (D. Mass. July 16, 1985) (appeal pending) (dealing with the arbitrability of § 10(b) claims).

Sevinor v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-3240-N (D. Mass. July 19, 1985) (appeal pending) (dealing with the arbitrability of § 10(b) and RICO claims).

(footnote continued on following page)

I.

All the plaintiffs were customers with trading accounts at brokerage firms, and all executed agreements in which they consented to arbitrate all controversies arising out of transactions affecting their accounts. Typical of these agreements is the standard Customer Agreement used by Merrill Lynch, Pierce, Fenner & Smith, Inc. which provides,

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(footnote continued from previous page)

Third Circuit

Fabi v. *Dean Witter Reynolds, Inc.*, No. 85-2881 (D.N.J. Nov. 21, 1985) (appeal pending) (§ 10(b) issue).

Horn v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, appeal docketed, No. 86-5215 (3d Cir.) (appeal pending) (§ 10(b) and RICO issues).

Fourth Circuit

Land v. *Dean Witter Reynolds, Inc.*, 617 F. Supp. 52 (E.D. Va. 1985) (appeal pending) (§ 10(b) and RICO issues).

Fifth Circuit

Beck v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, appeal docketed, No. 86-2051 (5th Cir.) (RICO issue only).

Smoky Greenhaw Cotton Co., Inc. v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, appeal docketed, No. 85-1310 (5th Cir. Mar. 28, 1986) (request for rehearing pending) (RICO issue only).

Sixth Circuit

Lerchen v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 83-CV-1479-DT (E.D. Mich. Nov. 29, 1985) (appeal pending) (§ 10(b) and RICO issues).

Sterne v. *Dean Witter Reynolds, Inc.*, C-1-85-24 (S.D. Ohio Jan. 16, 1986) (appeal pending) (dealing with § 10(b) issue).

Drazdik v. *Kidder Peabody & Co., Inc.*, C85-2442 (N.D. Ohio Mar. 3, 1986) (appeal pending) (§ 10(b) issue).

Eighth Circuit

Webb v. *R. Rowland & Co., Inc.*, 613 F. Supp. 1123 (E.D. Mo. 1985) (appeal pending) (§ 10(b) issue).

Ninth Circuit

Badart v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 84-6448 (C.D. Cal. July 25, 1985) (appeal pending) (§ 10(b) issue).

Battershall v. *A.G. Becker, Inc.*, appeal docketed. No. 85-6073 (9th Cir.) (appeal pending) (§ 10(b) issue).

(footnote continued on following page)

> It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration of the National Association of Securities Dealers, Inc., as the undersigned may elect . . . Arbitration must be commenced by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, therein electing the arbitration tribunal. In the event the undersigned [customer] does not make such a designation within five (5) days of such demand or notice, then the undersigned [customer] authorizes you to do so on behalf of the undersigned [customer].

Joint Appendix (*Jacobson* v. *Merrill Lynch*) at 292. All the plaintiffs incurred losses in investment accounts covered by similar arbitration agreements, and all the plaintiffs instituted suits claiming that those losses resulted from violations of

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(footnote continued from previous page)

Delman v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. CV 84-3869 (C.D. Cal. June 25, 1985) (appeal pending) (§ 10(b) issue).

Hamling v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. CV 84-5194 (C.D. Cal. May 15, 1985) (appeal pending) (§ 10(b) issue).

Stratton v. *Dean Witter Reynolds, Inc.*, No. 85-1028 (S.D. Cal. Aug. 12, 1985) (appeal pending) (§ 10(b) issue).

Felkner v. *Dean Witter Reynolds, Inc.*, No. CV 84-3267 (C.D. Cal. May 6, 1985) (appeal pending) (RICO issue).

Eleventh Circuit

Gorman v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, appeal docketed, No. 85-5419 (11th Cir. Dec. 19, 1985) (request for rehearing in banc granted) (§ 10(b) issue).

Miller v. *Dean Witter Reynolds, Inc.*, No. 84-1079 (S.D. Ala. July 25, 1985) (appeal pending) (§ 10(b) issue).

Roberts v. *Lehman Brothers Kuhn Loeb, Inc.*, No. 84-1421 (S.D. Fla. June 22, 1985) (appeal pending) (§ 10(b) issue).

Wolfe v. *E.F. Hutton & Co., Inc.*, appeal docketed, No. 85-3352 (11th Cir. Dec. 29, 1985) (request for rehearing in banc granted) (§ 10(b) issue).

federal securities laws, state statutory and common laws, and various securities-industry rules. In all five cases the district courts on the authority of *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985), granted motions to compel arbitration of the state-law claims. No appeal challenges those orders. In *Blumenthal*, No. 85-5552, the district court refused to order arbitration of the RICO claim, while in *Jacobson*, Nos. 85-3282, 85-3311, and 85-3343, the district court ordered arbitration of the RICO claim. Claims predicated upon securities-industry rules[3] have been dismissed and are not before us. Before considering the substantive legal issues presented by these appeals, a preliminary question concerning the coverage of the arbitration agreements must be dealt with. In one of the five cases, *Gant*, No. 85-5439, the plaintiff argues that the broker amended the arbitration agreement to exclude claims arising under federal securities laws. The plaintiff contends, therefore, that because the arbitration agreement does not cover federal securities claims she is free to bring her suit in federal court. The logic of plaintiff's argument, however, is flawed.

Effective December 28, 1983 the Securities and Exchange Commission (SEC) promulgated a regulation making it a "fraudulent, manipulative or deceptive act" for a broker "to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the Federal securities laws. . . ." 17 C.F.R. § 240.15c2-2(a) (1985). This regulation goes on to mandate that for agreements entered into prior to December 28, 1983, the broker is required to send a notice "no later than December 31, 1984" informing customers that the arbitration agreements they executed do not cover federal securities laws. *Id.* at § 240.15c2-2(c).

All the arbitration agreements involved in these five appeals were executed prior to December 28, 1983. Consequently, in at

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3 These claims should be distinguished from claims of violations of rules of the Securities and Exchange Commission. The latter claims were treated as section 10(b) claims.

least one situation, the broker, Kidder, Peabody & Co., sent a notice informing the plaintiff that the arbitration agreement did not cover federal securities laws claims. In the case in which the plaintiff raises this issue, the notice was not received until after the complained of federal securities laws violations occurred. At best, therefore, the notice acted as an amendment at the time plaintiff's account was next traded following receipt of the notice. Hence, even if the notice constituted an amendment, it does not affect any of the claims before us.

II.

In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Supreme Court, relying on the anti-waiver provision in section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, held that a claim for damages for violation of section 12(2) of that act, 15 U.S.C. § 771(2), was not subject to contract arbitration. This court, in *Ayers* v. *Merrill Lynch, Pierce, Fenner & Smith*, 538 F.2d 532 (3d Cir. 1976), applied the *Wilko* rule to claims for damages for violation of section 10(b) of the Securities and Exchange Act of 1934. Relying on the similar anti-waiver provision in section 29(a) of the 1934 Act, 15 U.S.C. § 78cc(a), and on Congress' acceptance of the view that the *Wilko* rule applied to claims under the 1934 Act, this court expressly rejected the contention that *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506 (1974) should be read as confining *Wilko* to claims under the 1933 Act. *Ayers*, 538 F.2d at 536-37.

The *Ayers* opinion, which is consistent with this court's earlier discussion of the same issue in *Moran* v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 245-46 (3d Cir. 1968) (dicta),[4] binds this panel unless we can conclude that it has been overruled by subsequent Supreme Court cases. *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, chapter 8, section C. The brokerage firms rely on two Supreme Court cases that they contend

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4 *See also Barrowclough* v. *Kidder, Peabody & Co.*, 753 F.2d 922, 940 n.17 (3d Cir. 1985).

accomplished that result. The first is *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985), which held that state law claims pleaded in a federal forum as pendent to claims under section 10(b) are arbitrable. The reasoning of that opinion, according to the brokerage firms, casts doubt upon *Ayers*. We disagree. In *Byrd* the Court took note of the line of cases in the lower federal courts applying the *Wilko* rule to section 10(b) claims and expressly declined to resolve the applicability of *Wilko* to section 10(b) claims. 105 S. Ct. at 1240 n.1. In the face of this express disclaimer the opinion cannot fairly be read as casting any doubt upon the continued authority of *Ayers* as precedent in this circuit.

The second case on which the brokerage firms rely is *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985). *Mitsubishi* held that an antitrust claim by an automobile dealer against a foreign automobile manufacturer was arbitrable. 105 S. Ct. at 3360-61. The Court in *Mitsubishi* rejected, as a rule of construction for arbitration agreements, the proposition that such clauses are inapplicable to federal statutory claims unless such claims are mentioned expressly. *Id.* at 3354-55. The issue presented in *Mitsubishi* was entirely different from that presented in *Ayers* and in *Wilko*. *Ayers* and *Wilko* did not involve interpretations of arbitration agreements; rather they involved interpretations of federal statutes that prohibit the application of forum-selection clauses. As Justice Blackmun carefully noted, "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi Motors*, 105 S. Ct. at 3355. The *Ayers* court identified section 29(a) of the 1934 Act as such a statute, and *Mitsubishi* does not undercut that statutory interpretation.

Because no subsequent Supreme Court decision may fairly be construed to have overruled *Ayers*, that opinion binds this panel. An extended discussion of the reasons advanced by the brokerage firms, concerning why *Wilko* should not apply to section 10(b) claims is therefore inappropriate. The district

courts properly followed the *Ayers* precedent, and the orders denying motions to compel arbitration of section 10(b) claims will be affirmed in each appeal.

III.

The question whether RICO claims should be subject to arbitration is one of first impression in this court. The question is complicated by the unique structure of the RICO statute, which is aimed at "racketeering" activity, defined in terms of other federal and state statutes. *Mitsubishi* teaches that exceptions to the general enforceability of arbitration agreements pursuant to the Federal Arbitration Act must be found, if at all, in regulatory statutes. In the case of RICO claims this involves consideration both of the RICO statute and the predicate statutes that it cross-references.

Unlike the 1933 and 1934 securities acts, RICO contains no anti-waiver provision. Moreover, the civil remedy for RICO violations has "evolv[ed] into something quite different from the original conception of its enactors." *Sedima, S.P.R.L.* v. *Imrex Co.*, 105 S. Ct. 3275, 3287 (1985). Because the reach of the civil remedy has been achieved largely by the courts, it is not surprising that there is no legislative history suggesting that Congress ever considered whether RICO civil claims should be arbitrated. Despite the absence of a statutory provision that could be construed as a general prohibition against such arbitration, the Court of Appeals for the Second Circuit recently held that RICO claims, for reasons of public policy, are not arbitrable. *See McMahon* v. *Shearson/American Express, Inc.*, 788 F.2d 94, 98-99 (2d Cir. 1986). Presumably the public policy reasons that the *McMahon* court had in mind included the complexity of most RICO claims, the provision in the statute for recovery of treble damages, and the need for developing the governing law on a case-by-case basis. We believe, however, that the *McMahon* court paid too little deference to the Supreme Court's decision in *Mitsubishi*. The *Mitsubishi* court concluded that "complexity should not suffice to ward off arbitration." 105 S. Ct. at 3357. The antitrust laws

are every bit as complex and in need of judicial interpretation as is the RICO statute. The Clayton Act also provides for treble damages, 15 U.S.C. § 15 (1982), yet the *Mitsubishi* Court held that the availability of this remedy did not require that private antitrust claims be deemed nonarbitrable. 105 S. Ct. at 3359. It would appear therefore that determining statutory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible.

The absence of any RICO statutory provision that would bar arbitration does not, however, resolve both of the appeals presenting RICO claims. Because of the unique structure of the RICO statute, which cross-references other predicate statutes, we must, in making the statutory interpretation required by *Wilko* and *Mitsubishi*, look to those statutes as well.

The Securities Exchange Act of 1934 contains a statute that has been definitively construed by this court to preclude arbitration of claims for violation of section 10(b). If a sufficient number of section 10(b) violations have taken place to trigger the applicability of RICO, plaintiffs will in most cases plead a RICO claim in order to take advantage of the triple damage remedy that the RICO statute affords. There is no evidence that Congress intended that the availability of RICO remedies for section 10(b) should suspend the operation of the anti-waiver provision of the Securities Exchange Act of 1934. Because the heart of the dispute still will be over whether the securities laws were violated, RICO plaintiffs relying on section 10(b) violations are, by virtue of section 29(a) of the 1934 Act, entitled to a judicial resolution of their RICO claims. Thus we will reverse the order in *Jacobson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 85-3282, 85-3311, and 85-3345, compelling arbitration of a RICO claim based on section 10(b) predicate acts.

We reach a different conclusion in *Blumenthal* v. *Dean Witter Reynolds, Inc.*, No. 85-5552, in which the complaint pleads RICO claims predicated on violations of the federal mail-fraud statute, 18 U.S.C. § 1341 (1982), and wire-fraud statute, 18 U.S.C. § 1342 (1982), in addition to predicate act

violations of section 10(b). *See* Complaint in *Blumenthal* at 13-14. The RICO claim based on section 10(b) violations is not subject to arbitration. The RICO claims predicated on mail and wire fraud, however, are arbitrable. No provision of the mail or wire fraud statutes bears any similarity to the anti-waiver provision of the 1933 and 1934 securities acts. The method of analysis required by *Wilko* and *Mitsubishi*, therefore, compels a different result. The RICO claims based on mail and wire fraud fall within the arbitration clause as written, and no federal statute prohibits application of the arbitration clause. The motion to compel arbitration of the RICO claims based on mail and wire fraud should have been granted.

CONCLUSION

In *Jacobson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 85-3282, 85-3311, and 85-3345, we affirm the order denying the motion to compel arbitration of section 10(b) claims and reverse the order compelling arbitration of the RICO claim. In *Erlbaum* v. *Prudential-Bache Securities, Inc.*, No. 85-1541, we affirm the order denying the motion to compel arbitration of the section 10(b) claims. In *Gant* v. *Kidder Peabody & Co.*, No. 85-5439, we affirm the order denying the motion to compel arbitration of the section 10(b) claims. In *Blumenthal* v. *Dean Witter Reynolds, Inc.*, No. 85-5552, we affirm the portion of the order denying arbitration of the section 10(b) claims and the portion of the order denying arbitration of the RICO claim based on section 10(b) violations, but we reverse the portion of the order denying arbitration of RICO claims predicated on mail and wire fraud. In *Burris* v. *Paine Webber, Jackson & Curtis, Inc.*, Nos. 85-5517 and 85-5542, we affirm the order refusing to compel arbitration of the section 10(b) claims.

ADAMS, Circuit Judge, concurring in part and dissenting in part.

These appeals question whether a party may insist on arbitration, pursuant to a predispute agreement, of a claim for relief under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission or under the Racketeer Influenced and Corrupt Organizations Act (RICO). I agree with the majority's disposition of the nonstatutory issues presented in the case, and, because of controlling precedent in this Circuit, I also agree that claims asserted under § 10(b) and Rule 10b-5 are not arbitrable. However, unlike the majority, I would hold that *all* RICO actions may be submitted to arbitration pursuant to the parties' valid agreement. Because my views differ from those expressed by the majority, I write separately.

I.

The question whether Rule 10b-5 actions against brokerage firms may be submitted to arbitration pursuant to a contractual agreement necessitates an analysis of a number of statutes and judicial decisions.

An appropriate starting point is the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982), which sets forth a federal policy favoring agreements to arbitrate. Section 2 provides, in part, that so long as the contract evidences a transaction involving commerce it "shall be valid, irrevocable, and enforceable, save upon any grounds as exist at law or in equity for the revocation of any contract." Section 3 requires that the district court stay pending actions where arbitration is appropriately invoked.

Despite the Federal Arbitration Act, passed in 1925, the Supreme Court held in *Wilko* v. *Swan*, 346 U.S. 427 (1953), that claims for relief under the antifraud provision in § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2) (1982), may proceed in a judicial forum regardless of any aribtration agreement between the parties. The Court reasoned that "§ 12(2) created a special right to recover for misrepresentation which differs substantially from the common-law action in that

the seller is made to assume the burden of proving lack of scienter," 346 U.S. at 431. In addition, the Supreme Court noted, the 1933 Act affords plaintiffs a choice of state or federal judicial forums, a broad choice of venue, and nationwide service of process. *Id.*; *see* § 22(a) of the 1933 Act, 15 U.S.C. § 77v(a) (1982). Because an agreement to arbitrate waives these procedural protections, the Court asserted, it violates the 1933 Act's "non-waiver" clause:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

§ 14, 15 U.S.C. § 77n (1982).

The *Wilko* Court explained that arbitration proceedings may lessen the protection Congress aimed to provide to investors through the Securities Act. "As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact' . . . cannot be examined." 346 U.S. at 436.

Section 10(b) of the 1934 Act is similar in many respects to § 12(2) of the 1933 Act, and the 1934 statute includes a non-waiver provision virtually identical to that found in the 1933 Act and relied upon in *Wilko*. *See* § 29(a) of the 1934 Act, 15 U.S.C. § 78cc(a) (1982). Further, the 1934 Act, like the earlier statute, contains special procedural rules, including exclusive federal jurisdiction and nationwide service of process. § 27, 15 U.S.C. § 78aa (1982). Thus, it could be argued that the *Wilko* holding, when logically extended, bars compelled arbitration of suits based on Rule 10b-5.

However, in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), a majority of five justices outlined a "colorable argument" that *Wilko* does not apply to Rule 10b-5 claims. *Id.* at 513. The Court stressed that unlike § 12(2), which provides an express right of action, the action based on § 10(b) and Rule

10b-5 is merely implied. In interpreting an implied cause of action, the Court suggested, a finding of congressonal intent to create an exception to the Arbitration Act may not be warranted. *Id.* at 513-14. The four dissenting justices disagreed, arguing that the holding of nonarbitrability in *Wilko* required a similar result under the 1934 Act. *Id.* at 525. In any event, the majority chose not to resolve the issue, since the case at hand involved a "truly international agreement" implicating unique policies and considerations of comity. *Id.* at 515.

Despite the reservations expressed by the Supreme Court in *Scherk*, two years later this Court held that Rule 10b-5 claims are not subject to arbitration agreements. *Ayres* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536 (3d Cir. 1976), *cert. denied*, 429 U.S. 1010 (1976). Although *Ayres*' consideration of the Rule 10b-5 issue was at best an alternative basis of the result reached, the Rule 10b-5 determination subsequently has been cited in this circuit as an independent and controlling holding. *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F.2d 923, 940 n.17 (3d Cir. 1985).

The Court in *Ayres* stated that it was not "persuaded that either the differences between the rights granted in the 1933 and 1934 Acts or any consideration of policy" warrants a distinction between the express cause of action under § 12(2) and the implied right under § 10(b). *Id.* at 536. Similarly, in other circuits there has been "an almost universal tendency in these decisions to distinguish *Scherk*," *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Moore*, 590 F.2d 823, 828 (10th Cir. 1978), and to follow *Wilko* in interpreting the 1934 Act in domestic disputes.[1]

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1 *See, e.g.*, Conover v. Dean Witter Reynolds, No. 85-6082 (9th Cir. July 17, 1986), McMahon v. Shearson/American Exp., Inc., 788 F.2d 94 (2d Cir. 1986); Sawyer v. Raymond, James & Associates, Inc., 642 F.2d 791 (S.C. 1980); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1039 (6th Cir. 1979); MLPF&S, Inc. v. Moore, 590 F.2d 23 (Dec. 78); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831, 833-35 (7th Cir. 1977); Sibley v. Tandy Corp., 543 F.2d 540, 543 (5th Cir. 1976); *cert. denied*, 434 U.S. 824 (1977); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538

Ayres paid particular attention to Congress' apparent acquiescence in the extension of *Wilko* by lower federal courts to bar arbitration of Rule 10b-5 claims. As the Supreme Court would later make clear, the primary consideration in determining the applicability of the Arbitration Act to a statutory cause of action is the intent of Congress. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 105 S. Ct. 3346, 3355 (1985). Thus, the *Ayres* court observed that, in 1975, Congress had amended § 28(b) of the 1934 Act. 15 U.S.C. § 78bb(b) (1982), to provide that disputes between members or participants in self-regulatory organizations, or between municipal securities dealers and brokers, may be arbitrated. The conference committee stated: "It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko* v. *Swan*, 346 U.S. 427 (1953), concerning the effect of arbitration proceeding provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations." H.R. Rep. No. 229, 94th Cong., 1st Sess. 111 (1965), *reprinted in* 1975 U.S. Code Cong. & Ad. News 321, 342. That the committee included this statement in amending the 1934 Act, the *Ayers* court concluded, suggests its belief that *Wilko* applies to causes of action under that Act. *See Ayres*, 538 F.2d at 537.

Whatever the merits of its reasoning, *Ayres* has not been undermined by subsequent developments. In *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985), the Supreme Court decided that the Arbitration Act required that state law claims pendent to nonarbitrable securites law counts be arbitrated, even if the issues overlap and even if the result is piecemeal litigation. The Court noted, but again did not decide, that whether *Wilko* applies to suits under Rule 10b-5 is unresolved. *Id.* at 1240 n.1. Significantly, Justice White, who had joined

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F.2d 532, 536 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976). However, a split in the circuits has recently emerged with the Eighth Circuit's opinion in *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 85-5156 (8th Cir. July 11, 1986), holding an arbitration clause valid and enforceable.

the dissenters in *Scherk*, apparently reconsidered his views and wrote a concurring opinion reiterating the reservations expressed by the *Scherk* majority, "to emphasize that the question remains open and the contrary holdings of the lower courts must be viewed with some doubt." *Id.* at 1244. However, Justice White declined to articulate any considerations that were not expressed in *Scherk*, and therefore not presented to or examined by this Court in *Ayres*.

The other development since *Ayres* appears to be the growing judicial appreciation of and deference to arbitration as a means of alternative dispute resolution. This stance may be best discerned in a series of recent Supreme Court decisions enforcing the broad congressional mandate favoring arbitration. *See Mitsubishi*, *supra* (antitrust dispute arising out of international agreement is subject to arbitration); *Byrd*, *supra* (ordering arbitration of pendent state law claims); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) (state laws undercutting the enforceability of arbitration agreements conflict with federal law and violate the Supremacy Clause); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ").

Nevertheless, this significant trend does not undercut any of the considerations of congressional intent addressed in *Ayres*. To be sure, arbitration permits a speedy and much less expensive method of resolving many controversies than would be available in a judicial forum, and this is especially salutary in view of crowded federal dockets and exorbitantly costly litigation. But I do not doubt the power of Congress to forbid arbitration of specified statutory claims. I do doubt, however, whether Congress has in fact forbade arbitration in regard to clause asserted under § 10(b).

While the Supreme Court may later take a different view of the issues addressed in *Ayres*, stare decisis requires that any panel of this court adhere to the undisturbed holding of a prior

panel. *See Miller* v. *Drexel Burnham Lambert, Inc.*, No. 85-5692, slip op. at 3812 (11th Cir. June 17, 1986); *McMahon* v. *Shearson/American Express, Inc.*, 788 F.2d 94, 97 (2d Cir. 1986). Accordingly, although I have some reservations regarding the wisdom of nonarbitrability, I concur in the majority's conclusion that *Ayres* dictates in this Circuit the nonarbitrability of causes of action premised on Rule 10b-5.

The issue whether a 10b-5 claim may be subject to an arbitration agreement is a close and difficult one. Neither side of the argument is without merit. It is significant, however, that as the statute requires that any arbitration provision covering a "non-arbitrable" controversy be declared void and unenforceable, 15 U.S.C. § 78cc (a) & (b), the determination that Congress intended to render non-arbitrable implied rights of action under § 10(b) would mean that courts must refuse to give force to all agreements—both pre- and post-dispute—to submit such controversies to arbitration, even after arbitration has taken place.

Given that *Barrowclough* may have incorrectly treated *Ayers* as binding authority, and in view of the doubts raised as to the continued wisdom of the *Ayers* approach in light of subsequent Supreme Court statements and the split among the circuits, it might be advisable to reconsider this important and controversial issue *in banc*. Because of the split in the circuits and the reservations in *Sherk* and *Ayres*, however, some uncertainty necessarily will remain until the Supreme Court speaks authoritatively to this issue. Since commercial relations affecting thousands of investors and scores of brokerage houses will remain in the shadow of doubt until then, an early definitive decision by the Supreme Court would be a helpful development.

II.

These appeals also present the difficult question whether RICO claims may be submitted to arbitration against a party's wishes, but in accord with a predispute agreement. Here, we are not encumbered by previous holdings since the issue of

arbitrability in RICO situations is one of first impression in this Court.

In *Mitsubishi*, the Supreme Court squarely addressed whether a federal statutory right of action may be the subject of an arbitration agreement, and held that any statutory claim may be arbitrated if congressional intent to the contrary is not evident.

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

105 S. Ct. at 3355.

As Justice Stevens observed in dissent, the Court had not previously spoken clearly on the issue, although broad language in a series of earlier cases concerning labor arbitration could be read to imply the nonarbitrability of any federal statutory claim. For example, in *McDonald* v. *City of West Branch*, 466 U.S. 284 (1984), the Court held that an unappealed arbitral decision pursuant to a collective bargaining agreement did not preclude a later civil rights suit under 42 U.S.C. § 1983 (1982) based on the same facts. The Court decided that "although arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard." *Id.* at 290. *See also Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (arbitration does not preclude suit under minimum wage provisions of the Fair Labor Standards Act); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (right to sue under Title VII of the Civil Rights Act of 1964 is not precluded by prior arbitral decision). In *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985), this Court relied on these cases and ruled that purely statutory ERISA claims within the federal court's exclusive jurisdiction

are not arbitrable. "There is an inherent incompatibility in referring to an arbitrator claims that fall within the exclusive jurisdiction of the federal courts and that arise as part of a comprehensive federal statutory scheme designed to assure protection to those individuals who fall within it." *Id.* at 940.

Mitsubishi spurned the basis proffered for this Court's decision in *Barrowclough*, stating that "we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." 105 S. Ct. at 3353. Although *Mitsubishi*, like *Scherk*, concerned an agreement to arbitrate disputes arising out of an international transaction, the *Mitsubishi* Court's rejection of a rule of nonarbitrability of statutory claims is stated in a portion of its opinion that is not confined to the context of international agreements. Thus, *Mitsubishi* would appear to limit the effect of *McDonald*, *Barrentine*, and *Gardner-Denver*. At most, those cases may be seen as construing the intent underlying the particular statutes at issue, or as a rule of preclusion and not of arbitrability, or perhaps as a special presumption against labor arbitrators because of their limited expertise. *See Alexander*, 415 U.S. at 57 ("the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.").

Given that even a statutory cause of action is subject to the Arbitration Act, our task is to examine the text and legislative history of the RICO statute for any congressional intent to preclude arbitration of that private right of action. This search reveals no indication that Congress intended to exempt RICO actions from the provisions of the Arbitration Act. Further, none of the special statutory features that motivated the *Wilko* and *Ayres* decisions are found in the RICO statute. RICO has no non-waiver provision; indeed, even though it creates a private right of action it affords few procedural protections that would be waived by an agreement to arbitrate.[2] Not only

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2 For example, the statute provides for federal jurisdiction over private claims, but does not specify whether such jurisdiction is exclusive. The courts that have addressed the issue are divided on the question.

is the statute silent on the arbitration issue, but the legislative history offers no indication that Congress intended to bar arbitration of private RICO actions.

Accordingly, those seeking to avoid arbitration of RICO claims rely primarily on considerations of public policy. They insist that arbitrators, whose decisions are not subject to thorough review, should not be responsible for developing this evolving area of law, and that RICO embodies vital federal policies which should be litigated in a judicial forum. Relying on these arguments, the Second Circuit recently ruled that agreements to arbitrate RICO claims are unenforceable. *McMahon* v. *Shearson/American Express, Inc.*, 788 F.2d 94, 98 (2d Cir. 1986).[3] The Second Circuit rested its view on *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), in which it had held that actions under the Sherman Act are not arbitrable.

In *Mitsubishi*, the Supreme Court declined to accept the *American Safety* rule as applied to antitrust disputes arising out of international agreements. And although, as *McMahon* observes, the Court carefully limited its holding to the international context, *see* 105 S. Ct. at 3355, its reasoning casts grave doubt on the Second Circuit's broad conception of "the inappropriateness of the United States Arbitration Act when strong public policy considerations are involved." *McMahon*, 788 F.2d at 98.

Compare Chas. Kurz Co. v. *Lombardi*, 595 F. Supp. 373, 381 n.11 (E.D. Pa. 1984) (concurrent) with *Kinsey* v. *Nestor Exploration Ltd.—1981A*, 604 F. Supp. 1365, 1370-71 (E.D. Wash. 1985) (exclusive). *Cf. Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (where statute is silent, presumption favors concurrent jurisdiction).

3 The Fifth Circuit also reached the conclusion that RICO claims are nonarbitrable, but later vacated that ruling so that the district court could consider the applicability of *Mitsubishi* to the issue. *Smoky Greenhaw Cotton Co.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1281 (5th Cir. 1986), *vacated in part*, No. 85-1310 (5th Cir. May 13, 1986) (per curiam).

The notion that judicially decreed public policy determines the arbitrability of particular disputes is inconsistent with the Supreme Court's instruction that only the congressional intent expressed in a statute or its legislative history is relevant to the issue. Second, the *Mitsubishi* Court itself "confess[ed] to some skepticism of certain aspects of the *American Safety* doctrine." 105 S. Ct. at 3357. In particular, it rejected the notion that where a statute implicates important public policy a judicial forum is required. Justice Blackmun wrote: "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 3358-59.

It seems clear, therefore, that public policy considerations do not compel the nonarbitrability of RICO claims. To this extent, the majority and I agree. We part company, however, over the notion that the arbitrability of RICO actions turns on the nature of the predicate offenses underlying such actions.

The majority appears to base its position primarily on its concern regarding the effect of a contrary holding: that Rule 10b-5 claims would not be arbitrable pursuant to the rule of *Ayres*, while a RICO claim predicated on an identical Rule 10b-5 violation may be submitted to arbitration. In stating that this result is unwarranted, the majority declares: "There is no evidence that Congress intended that the availability of RICO remedies for section 10(b) should suspend the operation of the anti-waiver provision of the Securities Exchange Act of 1934." Majority Typescript at 17.

This reasoning, I believe, misconceives the appropriate inquiry. The focus must be on whether in enacting a law Congress intended to prevent waiver of the right to a judicial forum: *lack of evidence* that Congress intended to allow arbitration is insufficient to defeat the strong presumption in favor of arbitraton set forth in the Arbitration Act. "We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi*, 105 S. Ct. at 3355.

Further, I do not agree that an action under RICO must be treated for purposes of arbitrability as an action under the securities laws whenever it is based upon a predicate offense that violates Rule 10b-5, as the majority's statement above would suggest.

A private right of action under RICO is a unique and separate claim to which the Arbitration Act logically applies. RICO is a manifestation of congressional concern with the special harm caused by those who engage in a pattern of wrongful offenses, and the private right of action under the RICO statute is distinct from one based on an underlying offense alone.

The structure of the legislation illustrates the distinction. The statute provides a lengthy list of predicate offenses, ranging from broadly described state criminal offenses such as "gambling" and "robbery" to numerous federal criminal, bankruptcy, and securities law provisions. *See* 18 U.S.C. 1961(1) (1982). It then proscribes, in part, the operation of any enterprise engaged in or whose activities affect interstate or foreign commerce, using income derived from a "pattern of racketeering activity," *id.* at § 1962, defined as the commission of at least two predicate offenses within a ten-year period, *id.* at § 1961(5). Further, an individual may maintain a private claim for injuries suffered as a result of such rackeeting activity. *Id.* at § 1964(c).

Given the clear distinction between the nature of a RICO violation and any particular predicate offense, the congressional intent in passing the Securities Exchange Act would not appear to be relevant in an inquiry into the legislative purpose animating RICO. And, focusing solely on the latter inquiry, as noted earlier there is simply no indication that Congress intended to foreclose application of the Arbitration Act to RICO claims.

To be sure, the position that all RICO claims are arbitrable, regardless of the predicate offenses averred, would lead to piecemeal litigation. Where a pre-dispute agreement to arbitrate had been entered into, a RICO claim based on Rule 10b-5

violations would proceed in an arbitral forum, while a securities claim based upon similar facts would be litigated in federal court. The issue of what preclusive effect, if any, should be accorded either decision is not before us.

While this may not be an optimum use of adjudicative resources, it is the inevitable result where Congress specifies the nonarbitrability of a few statutory provisions and applies the sweeping Arbitration Act to all others. It is also consistent with the Supreme Court's action in *Byrd*, where it adhered to the Act's mandate and ordered the arbitration of pendent state law claims, while a Rule 10b-5 action concerning the same transactions and alleged wrongs continued in federal court. As the Supreme Court stated in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 20 (1983): "[F]ederal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 20 (emphasis in original). Should Congress desire a different result, it, of course, may so legislate.

In contrast to the result I advocate, the majority's approach not only bifurcates the proceedings, but also compels an unwarranted division of plaintiff's single RICO claim. It suggests that where a RICO count is predicated on arbitrable and nonarbitrable offenses the RICO claim itself will be split and heard in separate proceedings. Thus, in *Blumenthal* v. *Dean Witter Reynolds, Inc.*, No. 85-5552, where plaintiff's complaint stated only a single count based on RICO, the ruling by the majority would divide that count in order to allow for arbitration of the mail and wire fraud issues and litigation in a court of the securities issues—despite the fact that the unique RICO offense depends, in this case, on whether the enterprise has engaged in mail and wire fraud *as well as* securities fraud within a ten-year period.

In my view, the position reached by the majority today fails to take note of the unique nature of a RICO violation, and the broad directive set forth in the Arbitration Act.

III.

Accordingly, while I concur in the decision regarding the nonarbitrability of Rule 10b-5 claims, primarily because of prior holdings of this Court, and the arbitrability in general of RICO claims, I respectfuly dissent to the extent the majority in *Blumenthal* and in *Jacobson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 85-3282, 85-3311 and 85-3343, forbids the arbitration of RICO claims that are predicated on Rule 10b-5 violations.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1844

ESTELLE JACOBSON and CYNTHIA CARSON,
Plaintiffs

—v.—

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., and ROBERT M. KOLACZYNSKI,
Defendants

MEMORANDUM OPINION

The court has before it a Motion by Merrill Lynch for Reconsideration of its Motion to Compel Arbitration. Defendant Kolaczynski also filed a Request for Reconsideration of his Motion to Compel Arbitration. We will treat these two motions together.

The defendants originally moved to compel arbitration of the plaintiffs' claims pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982). In an Order dated December 3, 1984, we declined to compel arbitration of the federal securities claims and adopted the intertwining doctrine to preclude severance of the plaintiffs' arbitrable claims from those which were not arbitrable. In light of the recent Supreme Court opinion of *Dean Witter Reynolds Inc.* v. *Byrd*, ____ U.S. ____, 105 S. Ct. 1238, U.S.L.W. 4222 (March 4, 1985), we will amend our earlier order and compel arbitration of the pendent claims, Counts V through IX of the plaintiffs' amended complaint. We include the RICO count within the arbitrable claims since there

is no anti-waiver provision contained within the statute pertaining to RICO. Any claims for which there are no statutory anti-waiver provision, and which are within the scope of the parties' agreement to arbitrate, must proceed the arbitration.

The *Byrd* decision resolved a conflict between the Circuit Courts of Appeal by rejecting the intertwining doctrine and compelling arbitration of the state law claims. The Supreme Court in *Byrd* stated: "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." 53 U.S.L.W. at 4223. The unanimous Court would compel arbitration "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* The Court went on to state that the agreement to arbitrate would be enforced, absent a ground for rescission of the arbitration agreement.

The plaintiffs contend that, as the Option Agreement they signed was induced by fraud, they are not bound by its terms. More specifically, they claim that the arbitration provisions do not apply where the entire contractual agreement is unenforceable due to traditional contract principles.

Unless the party resisting arbitration can demonstrate that the arbitration clause itself was a product of fraud, the parties may still be compelled to arbitrate their dispute. A contention of fraud in the inducement of a contract containing an arbitration clause is insufficient to block arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967); *Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Commission*, 387 F.2d 768 (3d Cir. 1967). The Supreme Court in *Prima Paint* stated that "the statutory language [of the Arbitration Act] does not permit the federal court to consider claims for fraud in the inducement of the contract generally." 388 U.S. at 404.

In the present case, there has been no claim that the defendants fraudulently induced the plaintiffs to enter into the agreement to arbitrate. Without a showing of fraud in the inducement of the arbitration clause itself, the parties must

proceed to arbitration. The question of whether the entire contract is unenforceable on the grounds of unconscionability must also proceed to arbitration as there has been no claim against the arbitration clause specifically.

We decline to compel arbitration of the plaintiffs' federal securities claims under § 10(b) and Rule 10b-5 for the reasons set forth in our earlier memorandum opinion. As this issue was not directly addressed by the Supreme Court in *Byrd* and the Court noted that it has not held that *Wilko*[1] would not apply in the context of a § 10(b) or Rule 10b-5 claim, we adhere to our earlier ruling and will not compel arbitration of the plaintiffs' federal securities claims.

The defendants contend that arbitration should be stayed pending the resolution of the judicial proceedings so that the predominant claims, the alleged violations of § 10(b) and Rule 10b-5, can be resolved first, thereby serving both the plaintiffs' right to have their claimed securities violations heard in federal court, and the strong federal policy recognizing the parties' contractual choice of an arbitration forum. *Ging* v. *Parker-Hunter, Inc.*, 544 F. Supp. 49, 55 (W.D. Pa. 1982); *see Surman* v. *Merrill Lynch*, 733 F.2d 59 (8th Cir. 1984).

The Supreme Court addressed this issue in *Byrd* and concluded that "neither a stay of proceedings, nor joined proceedings, is necessary to protect the federal interest in the federal-court proceeding." 53 U.S.L.W. at 4224. Accordingly, we decline to order a stay of the arbitration proceedings.

An appropriate order will issue.

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1 *Wilko* v. *Swan*, 346 472 (1953) (holding that a predispute agreement to arbitrate claims arising under § 12(2) of the Securities Act of 1933 was not enforceable).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1844

ESTELLE JACOBSON and CYNTHIA CARSON,
Plaintiffs

—v.—

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., and ROBERT M. KOLACZYNSKI,
Defendants

ORDER

AND NOW, this 19th day of April, 1985, for reasons set forth in the accompanying Memorandum Opinion, IT IS ORDERED that:

(1) the parties proceed to arbitration on Counts V through IX of the plaintiffs' amended complaint, and

(2) Defendants request for a stay of arbitration pending judicial resolution of the claimed securities violation is DENIED.

/s/ GLENN E. MENCER
United States District Judge

cc: David E. Daniels, Esquire
Marten R. Jenkins, Esquire
Stephen C. Veltri, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1844

ESTELLE JACOBSON and CYNTHIA CARSON,
Plaintiffs,

—v.—

MERRILL LYNCH PIERCE FENNER & SMITH, INC., and ROBERT M. KOLACZYNSKI,
Defendants.

ORDER

AND NOW, this 10th day of May, 1985, upon consideration of the Motion of Defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc.,

IT IS ORDERED that this Court's Order entered in the within proceeding April 19, 1985, is hereby amended by adding thereto the following sub-(3):

(3) Defendants' request to compel arbitration of Counts I through IV [wherein plaintiffs assert claims arising under § 10(b) of the Securities Exchange Act of 1934] of the Amended Complaint, and to stay the within proceedings pending such arbitration, is DENIED.

IT IS FURTHER ORDERED, upon Motion of the Plaintiffs, that said Order is amended to comply with Third Circuit Rule 23 and to provide that:

(4) Count V, an alleged cause of action relative to the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968, which this Court compelled to arbitration in paragraph (1) does in the

opinion of this Court involve a controlling question of law as to the applicability of the United States Supreme Court decision in *Dean Witter Reynolds, Inc. v. Byrd*, ____ U.S. ____, 105 S.Ct. 1238 (1985) to the arbitrability of RICO claims, including the issue of retroactive application, and to which there is substantial ground for difference of opinion and that an immediate appeal from said Order may materially advance the ultimate termination of the above-captioned litigation pursuant to 28 U.S.C. § 1292(b).

/s/ GLENN E. MENCER
United States District Judge

cc: Counsel of Record

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1844

ESTELLE JACOBSON and CYNTHIA CARSON,
Plaintiffs

—v.—

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., and ROBERT M. KOLACZYNSKI,
Defendants

MEMORANDUM

This action arises out of alleged violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act (RICO) as well as alleged violations of common law. We have federal question jurisdiction pursuant to 28 U.S.C. § 1331 and also pendent jurisdiction over the state law claims.

The Court has before it a Motion by the Plaintiff for Leave to File an Amended Complaint which we grant in the interest of justice and in accord with the liberal pleading rules of federal practice. Also pending are Motions by the defendants Kolaczynski and Merrill Lynch to Dismiss and Strike various counts of the plaintiffs' complaint, to Compel Arbitration, For a More Definite Statement and to Strike a Prayer for Relief. We will grant the plaintiffs' Motion and also consider the defendants' motions at this time.

The plaintiffs, mother and daughter, are joint tenants of an options account held with Merrill Lynch which was opened on

or about June 23, 1981. Estelle Jacobson, the mother, was a recent widow at that time and relied heavily on the advice of Robert Kolaczynski, a broker-dealer employed by Merrill Lynch. The plaintiffs' account consisted of securities inherited from Estelle's husband, the late Roger Jacobson. Estelle was dependent upon the interest and earnings of the inherited securities for her support. At the time the joint account was opened, the value of the securities then owned and deposited was $125,000.00. The defendant Kolaczynski allegedly misrepresented to the plaintiffs the risks of engaging in options trading and churned the plaintiffs' account to generate commissions. On or about September 1983, the plaintiffs learned that there was no balance remaining in the account.

Plaintiffs claim that the defendants failed to comply with the rules and regulations of the Securities and Exchange Commission, the New York Stock Exchange, the National Association of Securities Dealers and failed to fulfill their fiduciary obligation to the plaintiffs. Plaintiffs also claim that the defendants violated the Securities Act of 1933, the Securities Exchange Act of 1934 and RICO, and intentionally caused the plaintiffs emotional distress. They are seeking general damages, as well as punitive damages on some counts and treble damages for the counts under RICO.

Motion to Compel Arbitration

The defendants move to compel arbitration of the plaintiffs' claims pursuant to the Federal Arbitration Act. When the plaintiffs opened their options account at Merrill Lynch, they signed a Standard Option Agreement and also a Customer Agreement, both of which contained arbitration provisions. The plaintiffs could not, however, sign away their rights under the Securities Act of 1933 and the Securities Exchange Act of 1934. Those Acts contain anti-waiver provisions.[1]

Section 29 of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), provides: "Any condition, stipulation or provision

1 § 14 of the Securities Act of 1933, 15 U.S.C. § 77n; § 29 of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a).

binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." This provision is uniformly held to render void agreements to arbitrate future Securities Act and Securities Exchange Act violations. *Wilko* v. *Swan*, 346 U.S. 472 (1953); *see also Ging* v. *Parker-Hunter, Inc.*, 544 F. Supp. 49 (W.D. Pa. 1982). Thus, the plaintiffs cannot be compelled to arbitrate their federal securities claims.

This Court will follow the reasoning of the New York court in *S.A. Mineracao Da Trindade-Samitri* v. *Utah International Inc.*, 576 F. Supp. 566 (S.D.N.Y. 1984) in holding the plaintiffs' RICO claims to be non-arbitrable as well. We also decline to sever the issues in this case since the factual issues in all of the plaintiffs' claims appear to be identical.

Motion to Dismiss and Strike Various Counts

A. *The stock exchange rules and rules of the national association of securities dealers*

The Securities Exchange Act does not expressly authorize private actions for stock exchange rule violations. The plaintiffs, in claiming violations of the New York Stock Exchange Rules, are seeking to imply private rights of action under the relevant congressional statutes. The Supreme Court in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), enunciated the standard for implying private actions. The Court stated:

> "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. University of Chicago, supra, 441 U.S. [677] at 686. Instead, our task is limited solely to determining whether Congress intended to create the private right of action. . . .

442 U.S. at 568.

The Supreme Court's decisions in *Touche Ross* and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979),

reflect a restrictive approach to implying private rights of action. Prior to *Transamerica* and *Touche Ross*, courts had found a statutory basis for implying private rights of action under §§ 6(b) and 27 of the Securities Exchange Act. *See Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir.), *cert. denied*, 396 U.S. 838 (1969). Both of these sections, however, have since been rejected as a basis for inplying a private right of action. *Jablon* v. *Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980).

The plaintiffs are also claiming a violation of rules of the National Association of Securities Dealers (NASD). No provision of the Securities Exchange Act explicitly provides for a private action for violations of stock association rules, however. The argument that the violation of a NASD rule gives rise to a private right of action is grounded primarily on § 15A(b)(6) of the 1934 Act, 15 U.S.C. § 780-3(b), which requires a securities association such as the National Association of Securities Dealers to adopt disciplinary rules. However, § 15A(b)(6) "neither confers rights on private parties nor proscribes any conduct as unlawful," *Touche Ross* v. *Redington*, 442 U.S. 560 (1979), and cannot indicate a legislative intent to create a private cause of action. *Emmons* v. *Merrill Lynch, Pierce, Fenner & Smith*, 532 F. Supp. 480 (S.D. Ohio 1982). The plaintiffs in this case are therefore barred from bringing a private action against the defendant under the New York Stock Exchange or NASD rules, so such count should be dismissed.

B. *Intentional infliction of emotion distress*

The standard which is followed in Pennsylvania for the tort of intentional infliction of emotional distress is set forth in the Restatement (Second) of Torts: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . ." Restatement (Second) of Torts, § 46(1) at 71 (1965). Pennsylvania courts and federal courts applying Pennsylvania law have consistently refused to extend

this tort to anything other than the most extreme and outrageous conduct. *Price* v. *Blyth Eastman Paine Webber, Inc.*, 576 F. Supp. 431 (W.D. Pa. 1983). We find that the conduct alleged by plaintiffs in their Complaint, even if fully proven, is not sufficiently "extreme and outrageous" as to permit recovery for intentional infliction of emotional distress.

C. *Defendants' remaining motions*

The two remaining motions by defendants to Dismiss the claims under RICO for failure to state a claim and for a more definite statement are denied at this time. The defendants are free, however, to reassert these motions after the plaintiffs' amended complaint has been filed.

Motion To Strike Prayer For Relief

The Securities Act of 1933 and the Securities Exchange Act of 1934 do not permit recovery of punitive damages. 15 U.S.C. §§ 771, 78bb(a); *Ging* v. *Parker-Hunter Inc.*, 544 F. Supp. 49 (W.D. Pa. 1982). Therefore, that portion of the plaintiffs' prayer for relief must be stricken.

An appropriate order will issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1844

ESTELLE JACOBSON and CYNTHIA CARSON,
Plaintiffs

—v.—

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., and ROBERT M. KOLACZYNSKI,
Defendants

ORDER

AND NOW, this 3rd day of December, 1984, upon consideration of Plaintiffs' Motion for Leave to File Amended Complaint and the Motions of Defendants Merrill Lynch, Pierce, Fenner & Smith and Robert M. Kolaczynski to Dismiss and Strike, to Compel Arbitration, For a More Definite Statement and to Strike a Prayer for Relief,

IT IS HEREBY ORDERED that:

(1) Plaintiffs' Motion for Leave to File Amended Complaint is GRANTED;

(2) Defendants' Motion to Compel Arbitration is DENIED;

(3) Defendants' Motion To Stay the within proceeding until such arbitration has been held is DENIED;

(4) Defendants' Motion To Dismiss plaintiffs' First Cause of Action for failure to state a claim upon which relief can be granted is GRANTED IN PART as to violations of the New York Stock Exchange Rules and Rules of

the National Association of Securities Dealers and DENIED as to the remainder of the First Cause of Action;

(5) Defendants' Motion to Dismiss Plaintiffs' Fifth Cause of Action for Intentional Infliction of Emotional Distress is GRANTED;

(6) Defendants' Motion to Dismiss Plaintiffs' RICO claims is DENIED;

(7) Defendants' Motion to Strike Prayer for Relief is GRANTED and Plaintiffs' Prayer for Relief is struck insofar as it seeks punitive damages under the Securities Act of 1933 and the Securities Exchange Act of 1934.

Plaintiffs have fifteen (15) days from the date of this Order in which to file an amended complaint.

/s/ GLENN E. MENCER
United States District Judge

cc: Counsel of Record

APPENDIX D

District Court Decisions Concerning the Enforceability of Agreements to Arbitrate Section 10(b) Claims

A. Cases Holding Section 10(b) Claims Arbitrable

First Circuit

Arent v. *Shearson/American Express, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,523 (D. Mass. Dec. 20, 1985)

Mowbray v. *Moseley, Hallgarten, Estabrook & Weden, Inc.*, No. 83-2851-C (D. Mass. July 16, 1985), *vacated*, No. 85-1647 (1st Cir. July 3, 1986)

Prawer v. *Dean Witter Reynolds, Inc.*, 626 F. Supp. 642 (D. Mass. 1985)

Sevinor v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 84-3240-N (D. Mass. July 19, 1985)

Second Circuit

Brener v. *Becker Paribas Inc.*, 628 F. Supp. 442 (S.D.N.Y. 1985)

Finkle & Ross v. *A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505 (S.D.N.Y. 1985)

Ilan v. *Shearson/American Express, Inc.*, 632 F. Supp. 886 (S.D.N.Y. 1985)

Intre Sport Ltd. v. *Kidder Peabody & Co.*, 625 F. Supp. 1303 (S.D.N.Y. 1985), *modified*, Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986)

Jarvis v. *Dean Witter Reynolds, Inc.*, 614 F. Supp. 1146 (D. Vt. 1985)

Johnson v. *Kidder Peabody & Co.*, No. 85 Civ. 178 (N.D.N.Y. July 29, 1985)

McMahon v. *Shearson/American Express, Inc.*, 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 94 (2d Cir. 1986)

Shamir v. *Kidder, Peabody & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 92,511 (S.D.N.Y. Mar. 11, 1985)

Terra Resources I v. *Burgin*, Fed. Sec. L. Rep. (CCH) ¶ 92,703 (S.D.N.Y. Apr. 1, 1986)

Wall Street Assocs. v. *Becker Paribas, Inc.*, No. 85 Civ. 4649 (S.D.N.Y. Sept. 19, 1985)

Third Circuit

Baker v. *Paine, Webber, Jackson & Curtis, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,757 (D. N.J. Apr. 10, 1986)

Fourth Circuit

Fisher v. *Prudential-Bache Securities, Inc.*, No. Y-86-388 (D. Md. May 12, 1986)

Land v. *Dean Witter Reynolds, Inc.*, 617 F. Supp. 52 (E.D. Va. 1985)

Shotto v. *Laub*, 632 F. Supp. 516 (D. Md. 1986)

Fifth Circuit

Coonly v. *Rotan Mosle, Inc.*, No. A-83-CA-529 (W.D. Tex. June 11, 1985)

Frye v. *Paine, Webber Jackson & Curtis*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,516 (N.D. Tex. Dec. 26, 1985)

Hymel v. *Delta Petroleum & Energy Corp.*, No. SA-83-CA-362 (W.D. Tex. June 19, 1985)

Sixth Circuit

Gerhardstein v. *Shearson/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,512 (N.D. Ohio Mar. 10, 1986)

Moncrieff v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 623 F. Supp. 1005 (E.D. Mich. 1985)

Yee v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-4017 (E.D. Mich. Mar. 31, 1986)

Seventh Circuit

Austad v. *Drexel Burnham Lambert, Inc.*, No. 85-C-9759 (N.D. Ill. Mar. 27, 1986)

Steinberg v. *The Illinois Co.*, No. 85-C-7131 (N.D. Ill. May 15, 1986)

Willis v. *Prudential-Bache Securities, Inc.*, No. L 85-0959 (N.D. Ind. July 10, 1985)

Eighth Circuit

Bob Ladd, Inc. v. *Adcock*, 633 F. Supp. 241 (E.D. Ark. 1986)

Houlihan v. *Schmacker* and *Meyer* v. *Schmacker*, Nos. 83-159 C(5) and 83-1356 C(5) (E.D. Mo. May 3, 1985)

Peele v. *Kidder, Peabody & Co. Inc.*, 620 F. Supp. 61 (W.D. Mo. 1985) (appeal pending)

Sulit v. *Dean Witter Reynolds, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,755 (W.D. Mo. Mar. 27, 1986)

Ninth Circuit

Anderson v. *Paine Webber Jackson & Curtis*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,446 (C.D. Cal. Sept. 23, 1985)

Byrd v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,225 (S.D. Cal. July 8, 1985) (on remand from Supreme Court)

Dees v. *Distenfield*, 618 F. Supp. 123 (C.D. Cal. 1985)

Geller v. *Nasser*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,409 (C.D. Cal. Nov. 18, 1985)

Jope v. *Bear Stearns & Co.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,393 (N.D. Cal. Nov 15, 1985)

Mann v. *Foster & Marshall/American Express, Inc.*, No. C84-925D (W.D. Wash. June 3, 1985)

Marx v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,311 (C.D. Cal. Aug 23, 1985)

Sacks v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 (C.D. Cal. Dec. 31, 1985)

Schultz v. *Robinson-Humphrey/American Express, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,515 (M.D. Ga. Mar. 4, 1986)

West v. *Drexel Burnham Lambert, Inc.*, 623 F. Supp. 26 (W.D. Wash. 1985)

Tenth Circuit

Blakely v. *Prudential-Bache Securities, Inc.*, No. A-85-442-BRT (D. Nev., Dec. 9, 1985)

Eleventh Circuit

Batteh v. *Prudential-Bache Securities, Inc.*, No. 84-452-Civ-J-14 (M.D. Fla. July 29, 1985)

Boyd v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 614 F. Supp. 940 (S.D. Fla. 1985)

Chandler v. *Drexel Burnham Lambert, Inc.*, No. C-85-1585-A (N.D. Ga. Oct. 29, 1985) (appeal pending)

Colangelo v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,365 (M.D. Fla. July 23, 1985)

Driscoll v. *Smith Barney, Harris Upham & Co.*, No. 84-8223 (S.D. Fla. June 6, 1985)

Finn v. *Davis*, 610 F. Supp. 1079 (S.D. Fla. 1985)

Greenstein v. *First Biscayne Corp.*, No. 82-0584 Civ. (S.D. Fla. May 16, 1985)

Gregory v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 84-1647 Civ. 1-10 (M.D. Fla. Apr. 9, 1985)

Hashemi v. *Merrill Lynch, Pierce, Fenner & Smith*, No. C82-2948A (N.D. Ga. Aug. 6, 1985)

Miller v. *Drexel Burnham Lambert, Inc.*, No. 83-6871 (S.D. Fla. July 31, 1985), *rev'd*, Fed. Sec. L. Rep. (CCH) ¶ 92,783 (11th Cir. June 17, 1986) (per curiam)

Niven v. *Dean Witter Reynolds, Inc.*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,059 (M.D. Fla. Mar 28, 1985)

Pruzan v. *Paine, Webber, Jackson & Curtis*, No. C84-2016A (N.D. Ga. Aug. 30, 1985)

Raiford v. *Merrill Lynch, Pierce, Fenner & Smith*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,269 (N.D. Ga. May 16, 1985)

Rockoff v. *Shearson Lehman/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,513 (S.D. Fla. Feb. 12, 1986)

Ross v. *Mathis*, 624 F. Supp. 110 (N.D. Ga. 1985)

Sanders v. *Robinson Humphreys/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,548 (N.D. Ga. Mar. 27, 1986)

Schultz v. *Robinson-Humphrey/American Express, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,515 (M.D. Ga. Mar. 4, 1986)

Walch v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,060 (M.D. Fla. Apr. 25, 1985)

Westwind Transp., Inc. v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-734 (M.D. Fla., Apr. 9, 1985)

B. Cases Holding Section 10(b) Claims Not Arbitrable

District of Columbia Circuit

Kalali v. *Prudential-Bache Securities, Inc.*, No. 85-3237 (D. D.C. June 30, 1986)

Second Circuit

Becker v. *Silverman*, 638 F. Supp. 193 (S.D.N.Y. 1986)

Brill v. *Prudential-Bache Securities, Inc.*, No. 84 Civ. 0846 (S.D.N.Y. June 13, 1986)

Couvaris v. *Paine Webber Jackson & Curtis Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,554 (S.D.N.Y. Feb. 24, 1986)

Clark v. *Kidder, Peabody & Co., Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,729 (S.D.N.Y. May 9, 1986)

Farino v. *Advest Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,758 (E.D.N.Y. May 1, 1986)

Gilmore v. *Shearson/American Express, Inc.*, No. 84 Civ. 9011 (S.D.N.Y. May 20, 1986)

Intre Sport, Ltd. v. *Kidder, Peabody & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986), *aff'd*, 795 F.2d 1004 (2d Cir. 1986), *pet. for cert. filed*, No. 86-40 (July 16, 1986)

IRPA Corp. v. *Shearson/American Express, Inc.*, No. 85 Civ. 1629 (S.D.N.Y. May 28, 1986)

Leone v. *Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985)

Levine v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,841 (S.D.N.Y. July 22, 1986)

Luce v. *Edelstein, et al.*, Fed. Sec. L. Rep. (CCH) ¶ 92,258 (Aug. 8, 1985)

Rush v. *Oppenheimer & Co.*, No. 84 Civ. 3219 (S.D.N.Y. June 27, 1986) (dicta) (decided after *McMahon*)

Weizman v. *Adornato*, 625 F. Supp. 1101 (E.D.N.Y. 1985)

Third Circuit

Blumenthal v. *Dean Witter Reynolds, Inc.*, No. 84-4799F (D. N.J. July 3, 1985), *reprinted in* 2 RICO L. Rptr. 275 (1985) *aff'd in part and rev'd in part*, 797 F.2d 1197 (3d Cir. 1986)

Burris v. Paine Webber, Jackson & Curtis, Inc., No. 85-5517 (D.N.J. 1985), *aff'd*, 797 F.2d 1197 (3d Cir. 1986)

Erlbaum v. *Prudential-Bache Securities, Inc.*, No. 84-5541 (E.D. Pa. Aug. 9, 1985)

Gant v. Kidder, Peabody & Co., No. 85-5439 (D.N.J. 1984), *aff'd*, 797 F.2d 1197 (3d Cir. 1986)

Green v. *Shearson Lehman/American Express, Inc.*, No. 85-1368 (Sept. 10, 1985)

Fourth Circuit

Blomquist v. *Churchill*, 633 F. Supp. 131 (D. S.C. 1985)

Glavin v. *Prudential-Bache Securities, Inc.*, 623 F. Supp. 629 (D. S.C. 1985)

Levendag v. *Churchill*, 623 F. Supp. 620 (D. S.C. 1985)

Fifth Circuit

Bustamante v. *Rotan Mosle, Inc.*, 633 F. Supp. 303 (S.D. Tex. 1986)

Cummings v. *A.G. Edwards & Sons, et al.*, 637 F. Supp. 132 (M.D. La. 1986).

King v. *Drexel Burnham Lambert, Inc.*, No. 3-Civ-85-000-932-P (N.D. Tex. Oct. 29, 1985), *aff'd*, No. 85-1717 (5th Cir. May 28, 1986)

Woodyard v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. H-85-5615 (S.D. Tex. July 10, 1986)

Sixth Circuit

Sterne v. *Dean Witter Reynolds, Inc.*, No. C-1-85-124 (S.D. Ohio Jan. 18, 1986) (appeal pending)

Seventh Circuit

Barr v. *The Illinois Co.*, No. 84-C-2076 (N.D. Ill. Oct. 29, 1985)

Gibson v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-C-7542 (N.D. Ill. June 18, 1985)

Goldberg v. *Drexel Burnham Lambert, Inc.*, No. 83-C-8586 (N.D. Ill. Jan. 15, 1986)

Robert A. Stone & Assocs. v. *Drexel Burnham Lambert, Inc.*, No. 85-C-6927 (N.D. Ill. Nov. 15, 1985)

Winkler v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 85-C-9120 (N.D. Ill. Apr. 25, 1986)

Eighth Circuit

Bale v. *Dean Witter Reynolds, Inc.* and *Haertel* v. *Dean Witter Reynolds, Inc.*, 627 F. Supp. 650 (D. Minn. 1986)

Nesslage v. *York Securities, Inc.*, 107 F.R.D. 389 (E.D. Mo. 1985) (appeal pending)

Webb v. *R. Rowland & Co.*, 613 F. Supp. 1123 (E.D. Mo. 1985) (appeal pending)

Ninth Circuit

Rhoades v. *Powell, et al.*, No. CV-F-85-549 (E.D. Cal. Sept. 5, 1986)

Schnitzer v. *Oppenheimer & Co.*, 633 F. Supp. 92 (D. Ore. 1985)

Tenth Circuit

Adams v. *Merrill Lynch, Pierce Fenner & Smith, Corp.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,328 (W.D. Okla. Sept. 20, 1985)

Coffey v. *Dean Witter Reynolds, Inc. et al.*, No. 8-K-2256 (D. Colo. July 16, 1986)

Eleventh Circuit

Gorman v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 609 F. Supp. 1054 (S.D. Fla.), *aff'd*, 780 F.2d 1032 (11th Cir. 1985) (*en banc* rehearing pending)

Krieck v. *Dean Witter Reynolds, Inc.*, No. GCA 84-0085 (N.D. Fla. Apr. 24, 1985)

Rojas Cancanon v. *Smith Barney, Harris Upham & Co.*, 612 F. Supp. 996 (S.D. Fla. 1985)

Scharp v. *Cralin & Co.*, 617 F. Supp. 476 (S.D. Fla. 1985)

Wolfe v. *E. F. Hutton & Co.*, No. 84-151-Civ-Orl-18 (M.D. Fla. Mar. 30, 1985)

C. Case Stayed Pending Eighth Circuit Decision in *Phillips*

Minnesota Odd Fellows Home Foundation v. *Engler & Budd Co.*, 630 F. Supp. 797 (D. Minn. Mar. 3, 1986)

APPENDIX E

District Court Cases Concerning the Enforceability of Agreements to Arbitrate Civil RICO Claims

A. Cases Holding Civil RICO Claims Arbitrable

Second Circuit

Brener v. *Becker Paribas Inc.*, 628 F. Supp. 442 (S.D.N.Y. 1985)

Development Bank v. *Chemtex Fibers Inc.*, 617 F. Supp. 55 (S.D.N.Y. 1985)

Wall Street Assocs. v. *Becker Paribas, Inc.*, No. 85 Civ. 4649 (S.D.N.Y. Sept. 19, 1985)

Third Circuit

Baker v. *Paine, Webber, Jackson & Curtis, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,757 (D. N.J. Apr. 10, 1986)

Bright v. *S&N Assocs.*, No. 85-6966 (E.D. Pa. June 18, 1986) (appeal pending)

Fourth Circuit

Land v. *Dean Witter Reynolds, Inc.*, 617 F. Supp. 52 (E.D. Va. 1985)

Nunes v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. M-84-3118 (D. Md. Jan. 10, 1986)

Sixth Circuit

Gerhardstein v. *Shearson/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,512 (N.D. Ohio Mar. 3, 1986)

Lerchen v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 83-CV-1479-DT (E.D. Mich. Nov. 29, 1985)

Yee v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-4017 (E.D. Mich. Mar. 31, 1986)

Seventh Circuit

Fisher v. *Prudential Bache Securities, Inc.*, et al., 635 F. Supp. 234 (N. D. Ill. 1986)

Robert A. Shaw & Assocs. v. *Drexel Burnham Lambert, Inc.*, No. 85-C-6927 (N.D. Ill. Nov. 15, 1985) (appeal pending)

Steinberg v. *The Illinois Co.*, No. 85 C 7131 (N.D. Ill. May 15, 1986)

Eighth Circuit

Bale v. *Dean Witter Reynolds, Inc.* and *Haertel* v. *Dean Witter Reynolds, Inc.*, 627 F. Supp. 650 (D. Minn. 1986)

Bob Ladd, Inc. v. *Adcock*, 633 F. Supp. 241 (E.D. Ark. 1986)

Ninth Circuit

Sacks v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 (C.D. Cal. Dec. 31, 1985)

West v. *Drexel Burnham Lambert, Inc.*, 623 F. Supp. 26 (W.D. Wash. 1985)

Eleventh Circuit

Colangelo v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,365 (M.D. Fla. July 26, 1985)

Finn v. *Davis*, 610 F. Supp. 1079 (S.D. Fla. 1985) (decided before *Mitsubishi*)

Rockoff v. *Shearson Lehman/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,513 (S.D. Fla. Feb. 12, 1986)

Ross v. *Mathis*, 624 F. Supp. 110 (N.D. Ga. 1985)

B. Cases Holding Civil RICO Claims Not Arbitrable

District of Columbia Circuit

Kaladi v. *Prudential-Bache Securities, Inc.*, 637 F. Supp. 1131 (D. D.C. 1986)

First Circuit

Sevinor v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 84-3240-N (D. Mass. July 19, 1985) (appeal pending)

Second Circuit

Brill v. *Prudential-Bache Securities, Inc.*, No. 84 Civ. 0846 (S.D.N.Y. June 13, 1986) (dicta)

Farino v. *Advest, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,758 (E.D.N.Y. May 1, 1986) (decided after *McMahon*)

S.A. Mineracao da Trindade-Samitri v. *Utah Int'l Inc.*, 576 F. Supp. 566 (S.D.N.Y. 1983), *order certified for interlocutory appeal*, 579 F. Supp. 1049 (S.D.N.Y.), *appealed on other grounds and affirmed*, 745 F.2d 190 (2d Cir. 1984)

Weizman v. *Adornato*, 625 F. Supp. 1101 (E.D.N.Y. 1985)

Third Circuit

Blumenthal v. *Dean Witter Reynolds, Inc.*, No. 84-4799F (D. N.J. July 3, 1985), *reprinted in* 2 RICO L. Rptr. 275 (1985), *aff'd in part and rev'd in part*, 797 F.2d 1197 (3d Cir. 1986)

Witt v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 602 F. Supp. 867 (W.D. Pa. 1985)

Fourth Circuit

Fisher v. *Prudential-Bache Securities, Inc.*, No. Y-86-388 (D. Md. May 12, 1986) (appeal pending)

Universal Marine Ins. Co. v. *Beacon Ins. Co.*, 588 F. Supp. 735 (W.D.N.C. 1984)

Seventh Circuit

American Concept v. *Irsay*, No. 84 C 0026 (N.D. Ill. Oct. 4, 1985) (appeal pending)

Myers v. *Rosenberg*, No. 83-C-1342 (N.D. Ill. Mar. 6, 1986)

Eighth Circuit

Webb v. *R. Rowland & Co.*, 613 F. Supp. 1123 (E.D. Mo. 1985) (appeal pending)

Ninth Circuit

Wilcox v. *Ho-Wing Sit*, 586 F. Supp. 561 (N.D. Cal. 1984) (decided before *Mitsubishi*)

Pruzan v. *Paine, Webber, Jackson & Curtis, Inc.*, No. C84-2016A (N.D. Ga. Aug. 30, 1985)

APPENDIX F

Statutory Provisions Involved

Section 2 of the federal Arbitration Act, 9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Selected Provisions of the Racketeer Influenced and Corrupt Organization Act

18 U.S.C. § 1961(1):

> "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the construction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section

186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C. § 1961(5):

pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their

accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indireectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964(a):

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not

limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

No. 86-487

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., and ROBERT M. KOLACZYNSKI,

Petitioners,

—v.—

ESTELLE JACOBSON and CYNTHIA CARSON,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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Merrill Lynch supplements its petition for a writ of certiorari to bring to the Court's attention a recent decision of the Court of Appeals for the Fifth Circuit. *Mayaja, Inc.* v. *Bodkin*, No. 85-2762 (5th Cir. Oct. 24, 1986). That decision, which concerns the arbitrability of RICO claims, conflicts directly with the decision of the Third Circuit in this case.

In the opinion below the Third Circuit prohibited arbitration of RICO claims predicated upon alleged violations of the Securities Exchange Act of 1934. (*See* Merrill Lynch petition, Point III). In the *Mayaja* case, the Fifth Circuit expressly "decline[d] to follow the reasoning of the Third Circuit" and held that all RICO claims, including those based on the 1934 Act, are arbitrable—thereby "further adding to the split already present among the circuits." (Slip op. at 13, 14 n.6).

The arbitrability of RICO claims is an issue of national import and of particular significance to the securities industry. (*See* Merrill Lynch petition, Point III). The conflict created between the Third and Fifth Circuits underscores the need for the Court to resolve this issue now.

Dated: November 6, 1986
New York, New York

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Supreme Court, U.S.
FILED
DEC 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3) (2) (2)

Nos. 86-487, 86-543 and 86-559

IN THE

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v.

ESTELLE JACOBSON and CYNTHIA CARSON,
Respondents.

PAINE, WEBBER, JACKSON & CURTIS, INC., SMITH BARNEY, HARRIS UPHAM & CO., INC. and DONALD J. PORTER,
Petitioners,

v.

MARILYN E. BURRIS
Respondent.

DEAN WITTER REYNOLDS, INC.,
Petitioner,

v.

HERBERT BLUMENTHAL,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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CONSOLIDATED BRIEF IN RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

1. Whether a pre-dispute agreement to arbitrate federal statutory claims is unenforceable where (1) Congress has conferred exclusive jurisdiction upon the federal courts to decide the claims; (2) Congress has not empowered the parties, by agreement or otherwise, to confer jurisdiction of claims on any other tribunal; and (3) arbitrators have no inherent power beyond that conferred by agreement of the parties to decide any of the parties' claims;

2. Whether a pre-dispute agreement to arbitrate a private cause of action under federal statutes is enforceable where such actions advance the public purposes of a federal, statutory, remedial scheme; and

3. Whether a pre-dispute agreement which waives the provisions of Section 27 of the Securities Exchange Act of 1934 in the context of claims asserted under Section 10(b) of that Act is unenforceable under Section 29(a) thereof as a stipulation waiving compliance with any provision of the Act.

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IN THE

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OCTOBER TERM, 1986

Nos. 86-487, 86-543 and 86-559

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
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Petitioners,

v.

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Respondents.

PAINE, WEBBER, JACKSON & CURTIS, INC.,
SMITH BARNEY, HARRIS UPHAM & CO., INC.
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On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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CONSOLIDATED BRIEF IN RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the petitions for certiorari, the following is relevant to these cases:

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78 aa.

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

STATEMENT OF THE CASE—PROCEDURAL POSTURE OF THIS CONSOLIDATED RESPONSE

The respondents are Estelle Jacobson and Cynthia Carson (the "Jacobson respondents"), appellants and cross-appellees in *Estelle Jacobson and Cynthia Carson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., and Robert M. Kolaczyinski*, 797 F.2d 1197 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3259

(U.S. September 25, 1986) (No. 86-487) ("*Jacobson*"); Marilyn E. Burris ("Burris"), appellee in *Burris v. Paine, Webber, Jackson & Curtis, Inc.*, decided *sub. nom. Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra, petition for cert. filed,* 55 U.S.L.W. 3295 (U.S. October 1, 1986) (No. 86-543) (the "*Burris* case"); and Herbert Blumenthal ("Blumenthal"), appellee in *Herbert Blumenthal v. Dean Witter Reynolds, Inc. and Daniel J. Turov,* decided *sub nom. Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra, petition for cert. filed,* 55 U.S.L.W. 3296 (U.S. October 7, 1986) (No. 86-559) (the "*Blumenthal* case").

The respondents do not dispute the accuracy of the statements of facts set forth in the petitions for a writ of certiorari in these cases. They believe it is helpful to add a comment on the procedural posture of this response.

Following service of the petition for a writ of certiorari in *Jacobson,* the Jacobson respondents, by their counsel, advised the Court by letter that they waived their rights to make a response. In the *Burris* case and the *Blumenthal* case, Burris and Blumenthal elected to make no response. Thereafter, by letter from the Clerk of Court dated November 17, 1986, this Court requested the Jacobson respondents, Blumenthal and Burris to file a response to the petitions for writs of certiorari in these cases. The Jacobson respondents, Burris and Blumenthal, are now complying with that request. In the interests of economy, the respondents have elected to file a consolidated response.

REASONS FOR GRANTING OR FOR NOT OPPOSING THE GRANT OF A WRIT OF CERTIORARI

Among other reasons, the petitioners have argued that a writ of certiorari should be issued to the Third Circuit Court of Appeals in these cases because there is a conflict among the United States Courts of Appeal on the issue of the enforceability of pre-dispute agreements to arbitrate claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act") and the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO").

Because of the conflict among the Courts of Appeal, the Jacobson respondents and Burris agree that a writ of certiorari should be granted. Blumenthal takes no position whether the Court should issue a writ of certiorari for any reason.

I.

THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO THE ENFORCEABILITY OF PRE-DISPUTE AGREEMENTS TO ARBITRATE CLAIMS ARISING UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934

As the Third Circuit Court of Appeals noted in these cases,

> . . . [O]ur holding that Section 10(b) claims are not arbitrable is consistent with the Court of Appeals for the Ninth Circuit decision in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986) but conflicts with the holding of the Court of Appeals for the Eighth Circuit in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986).

Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197, 1199 n.2.

Before the Third Circuit's ruling in these cases, the Second Circuit, in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *cert. granted,* 107 U.S. 60 (U.S. October 6, 1986) (No. 86-44) ("McMahon"), held that pre-dispute agreements to arbitrate claims asserted under Exchange Act Section 10(b) ("Section 10(b)") are not enforceable. After the Third Circuit's decision in this case, the Courts of Appeal for the Fifth, Ninth and Eleventh Circuits also held that pre-dispute agreements to arbitrate claims arising under Section 10(b) are not enforceable.[1] The Eighth Circuit's decision in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d

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[1] *Bustamante v. Rotan Mosle, Inc.*, 802 F.2d 815 (5th Cir., 1986); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir., 1986), *petition for cert. filed,* 55 U.S.L.W. 3159 (U.S. August 29, 1986) (No. 86-321); and *Wolfe v. E.F. Hutton & Co., Inc.*, 800 F.2d 1032 (11th Cir. 1986) (*en banc*).

(footnote continues)

1393 (8th Cir. 1986), *petition for cert. filed,* 55 U.S.L.W. 3296 (U.S. Oct. 7, 1986) (No. 86-578) ("*Phillips*"), has recently been joined by the First Circuit's decision in *Page v. Moseley, Halloarten, Estabrook & Weeden, Inc.,* No. 86-1021, slip op. (November 26, 1986) (available on Lexis, Qenfed library, U.S. App. File) ("Page"), holding pre-dispute agreements to arbitrate Section 10(b) claims enforceable.

The conflict among the Circuits is plain and unavoidable. Resolution of the conflict among the Circuits will be necessary to achieve uniform application of federal law. The respondents recognize that, given the national scope of the activities of many brokerage firms, the broad venue provisions of Section 27 of the Securities Exchange Act of 1934 might permit persons otherwise subject to the *Phillips* or *Page* decisions to bring actions in the Third or other Circuits where pre-dispute agreements to arbitrate Section 10(b) claims are enforceable. Respondents also recognize that customers of brokerage firms who have signed predispute arbitration agreements, who would normally choose to bring an Exchange Act action within and who cannot afford to proceed outside the First or Eighth Circuits will be denied the right to proceed in the judicial forum. In respondents' view, this right is properly secured for Exchange Act claimants in the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits.

Because there is a conflict among the Courts of Appeal, the respondents cannot in good faith, and do not, oppose the petitions for writ of certiorari in these cases. Beyond that, especially because the Court has issued a writ of certiorari in *McMahon,* the Jacobson respondents and Burris believe that granting a writ of certiorari here will materially assist the Court in resolving the questions presented by these cases. *See,* discussion *infra* at 9-14.

(footnote continued)

In addition, in pre-1986 decisions the Sixth, Seventh and Tenth Circuit Courts of Appeals have held pre-dispute arbitration agreements to be unenforceable. *Mansbach v. Prescott, Ball & Turben,* 598 F.2d, 1017 (6th Cir. 1979). *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 558 F.2d 831 (7th Cir. 1977); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore,* 590 F.2d 823 (10th Cir. 1978).

II.

THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AS TO THE ENFORCEABILITY OF PRE-DISPUTE AGREEMENTS TO ARBITRATE CLAIMS ARISING UNDER THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

The Third Circuit Court of Appeals' "holding that RICO claims based on non-arbitrable predicate offenses are not arbitrable conflicts with the holding of the Court of Appeals for the Second Circuit in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986)." *Jacobson*, 797 F.2d at 1199, n.2. The Third Circuit's opinion in these cases also conflicts with the decision of the United States Court of Appeals for the First Circuit in *Page* and the decision of the Court of Appeals for the Fifth Circuit in *Mayaja, Inc. v. Bodkin*, 803 F.2d 157 (5th Cir. 1986) (*"Mayaja"*).

To the limited extent that the Third Circuit decision in *Jacobson* and the *Burris* cases holds unenforceable pre-dispute agreements to arbitrate RICO claims predicated solely on violations of federal securities laws, the result does not conflict with the decisions in *McMahon* and *Page*. However, the conflict between the reasoning in the *Jacobson* and *Burris* cases, on the one hand, and in *McMahon* and *Page* on the other, remains. The holding in the *Jacobson* and *Burris* cases does conflict with the holding in *Mayaja*.

To the extent that the Third Circuit in the *Blumenthal* case held enforceable pre-dispute agreements to arbitrate RICO actions predicated on mail and wire fraud, the result is consistent with that reached in *Mayaja*. However, the reasoning in *Mayaja* and in *Blumenthal* is different. The Fifth Circuit in *Mayaja* "respectfully decline[d] to follow the reasoning of the Third Circuit." *Mayaja, Inc. v. Bodkin*, 803 F.2d at 163, n.6.

The conflict among and the confusion resulting from these decisions is apparent. Therefore, the respondents cannot in good faith oppose the granting of the petitions for writ of certiorari in these cases.

III.

RESPONDENTS DISPUTE THOSE ARGUMENTS FOR CERTIORARI WHICH GO TO THE MERITS OF THE COURT OF APPEALS' DECISION IN THESE CASES; BUT BECAUSE THIS COURT HAS ISSUED A WRIT OF CERTIORARI IN *McMAHON*, THE JACOBSON RESPONDENTS AND BURRIS AFFIRMATIVELY URGE THAT A WRIT OF CERTIORARI BE ISSUED SO THAT THEY MAY HAVE AN OPPORTUNITY TO ADDRESS THE MERITS OF THESE ISSUES FULLY.

The petitioners also argue that this Court should issue writs of certiorari in these cases because the Court of Appeals' decision (1) burdens the federal courts with cases arising under the federal securities laws, thus affecting the administration of justice in the federal courts (*Petition for Certiorari* in *Jacobson*, 6-7; *Petition for Certiorari* in the *Burris* case, 10; *Petition for Certiorari* in the *Blumenthal* case, 13); and (2) is fundamentally incorrect in its resolution of the issues both as a matter of analysis (*Petition for Certiorari* in the *Blumenthal* case, 8-10) and as a matter of conflict with the rationale and/or holding of this Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985) ("*Mitsubishi*") and *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985) ("Byrd") (*Petition for Certiorari* in *Jacobson*, 9-12; *Petition for Certiorari* in the *Burris* case, 9; and *Petition for Certiorari* in the *Blumenthal* case, 10-13; 19-20). These arguments necessarily reach the merits of the decisions below.[2]

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[2] The petitioners argue that certiorari should be granted because the decision below increases or fails to decrease litigation in the Federal courts. In and of itself, this argument does not address the merits of the decision below and is not a basis for granting the petitions here. It does not follow that parties whose claims under the federal securities laws or RICO have matured and who want to waive those claims in favor of contractually empowering arbitrators to decide similar rights created by contract will not continue to do so, regardless of the decision below. Furthermore, the decision in these cases does not open the federal courts to a class of cases which were not in the federal courts before these cases were decided. Whatever litigation is in the federal courts under the Exchange Act or RICO is there because Congress

(footnote continues)

If the Court had not issued a writ of certiorari in *McMahon,* the respondents would argue that, absent a conflict among the Circuit Courts of Appeal, the merits of the decision in these cases do not warrant review by this Court. However, the Court will likely address the same merits issues in *McMahon.*

Thus, any argument about merits in these responses becomes one not of opposing certiorari but of attempting to influence the Court's ultimate decision on the merits. This would seem best done in a brief on the merits, with an opportunity for both respondents and petitioners to fully address the issues. Thus, the question for respondents becomes whether they should simply limit their response to not opposing the petitions for certiorari and address the merits issues in briefs *amicus curiae* in *McMahon* or whether they should affirmatively urge the Court to grant the petitions in these cases.

(footnote continued)

intended for it to be there, an intent made clear in Congress' mandate of exclusive jurisdiction in the federal courts of all Exchange Act and RICO civil actions. *See, infra,* note 5.

Similarly, although there may be hundreds or even thousands of cases filed in the federal courts under the federal securities laws, it is impossible to determine from the numbers supplied by the petitioners (*Petition* in *Jacobson* at 6, n.8) how many of these cases are otherwise subject to arbitration agreements and how many of these cases arise under the Exchange Act. Perhaps the best measure of the number of cases involving both those factors is the number of reported district court decisions involving the issue of the enforceability of pre-dispute agreements to arbitrate claims under Section 10(b). Appendix D to the *Petition* in the *Jacobson* case shows 107 such cases have been filed in the district courts within the jurisdiction of the twelve United States Courts of Appeal. Thus, on average, approximately nine such cases have been filed in each of the twelve federal judicial circuits. Whether the failure to eliminate those cases supports a petition for certiorari is doubtful in the absence of conflict among the Courts of Appeal.

To the extent that the petitioners' "administration of justice" arguments are predicated on the argument that there would be no increase or would be a decrease in federal court litigation if the Court of Appeals had decided the issues in these cases in accordance with petitioners' views, then these arguments do reach the merits.

For two reasons, the Jacobson respondents and Burris go beyond simply not opposing the petitions in these cases, and urge the Court to issue certiorari and to consolidate these cases with *McMahon.*

First, the *Jacobson* respondents and *Burris* must be uncertain whether or not they will be permitted to file briefs *amicus curiae* in *McMahon.*[3]

Second, even if permitted to file briefs *amicus curiae* in *McMahon,* any such briefs would be more limited than a brief on the merits. Sup.Ct.R. 36.2, 36.3. This may be a significant limitation in that there are a number of arguments on the merits, each of which calls for a careful, thoughtful and detailed analysis. Even the relatively less difficult questions concerning the effect of the non-waiver provisions of Exchange Act Section 29(a), 15 U.S.C. § 78cc(a), on an arbitration agreement's waiver of the provisions of Section 27 of the Exchange Act, 15 U.S.C. § 78aa; the vitality of the core of the *"American Safety"* doctrine [4]; and the relationship of *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Systems, Inc.,* 450 U.S. 728 (1981) and *McDonald v. City of West Branch,* 466 U.S. 284 (1984) to *Mitsubishi* in a non-international setting require detailed analysis. In addition, there is the difficult issue of the scope and effect of *Mitsubishi,* not simply in terms of its applicability to non-international disputes or of the continued vitality of the core of the *American Safety* doctrine, but also in terms of the fundamental arbitrability of substantive federal, statutory rights given that (a) Congress has vested exclusive jurisdiction of Exchange Act and RICO claims in the federal courts,[5] (b) the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"), at

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[3] The Jacobson respondents have requested that the *McMahon* parties consent to a brief *amicus curiae.* The *McMahon* respondents have consented. Counsel for petitioners in *McMahon* have refused their consent.

[4] *See, American Safety Equipment Corp. v. J. P. Maguire & Co.,* 391 F.2d 821 (2d Cir. 1968). *See also, Mitsubishi, supra,* 105 S.Ct. at 3355-60.

[5] Exclusive federal jurisdiction of Exchange Act claims is mandated in Section 27 of the Exchange Act, 15 U.S.C. § 78aa. Exclusive federal jurisdiction of RICO claims is provided for in 18 U.S.C. § 1964(c). As reviewed in *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 105 S. Ct. 3275, 3280-1

(footnote continues)

least on its face, does not purport to empower parties to an arbitration agreement to confer jurisdiction of federal claims on an arbitration tribunal; (c) the Arbitration Act, at least on its face, does not purport to confer any jurisdiction over cases arising under federal law on any arbitration tribunal; (d) there appears to be no inherent power in the parties to a dispute to confer jurisdiction of cases arising under federal law on any tribunal—whether state, federal or otherwise—and especially where Congress (1) has vested federal courts with exclusive jurisdiction and (2) has not itself authorized the parties to consent to adjudication of claims arising under federal law before a tribunal to whom Congress has not specifically transferred jurisdiction as, for example, Congress has done in the United States Magistrate's Act, 28 U.S.C. § 636(c). The Jacobson respondents and Burris believe these arguments and questions will be best explored for the benefit of the parties and the Court in briefs on the merits in these cases.

(footnote continued)

(1985), the legislative history of RICO shows that its private remedy was patterned after the anti-trust prototype of Section 4 of the Clayton Act, 15 U.S.C. § 15. Well before the RICO legislation was enacted, this Court had held that virtually identical jurisdictional language in Section 4 of the Clayton Act conferred exclusive jurisdiction on the federal courts of anti-trust claims. *Freeman v. Bee Machinery Corp.*, 319 U.S. 448, 451 n.6, *reh. denied*, 320 U.S. 809 (1943). As one court has noted, "it would be anomalous . . . to hold that the jurisdictional grant under the RICO statute did anything other than create exclusive federal jurisdiction over civil claims by persons injured by violations of 18 U.S.C. § 1962." *County of Cook v. Midcon Corp.*, 574 F.Supp. 902, 912 (N.D. Ill. 1983).

CONCLUSION

The scope of federal policy favoring enforcement of agreements to arbitrate commercial disputes is the subject of conflict and confusion among the Courts of Appeal. The respondents recognize that the conflict will continue until this Court resolves it. Although they cannot and do not challenge the result or holdings in these cases, the respondents also cannot in good faith dismiss the existence of the conflict or the need to resolve it. Given that fact and given the fact that this Court has granted the petition for certiorari in *McMahon,* the Jacobson respondents and Burris concur with the petitioners that the Court should issue a writ of certiorari to review the decisions below. Blumenthal does not oppose the issuance of a Writ of Certiorari.

Dated: December 17, 1986

Respectfully submitted,

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